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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 146.

JAMES A. LOUDON, APPELLANT,

vs.

THE CITY OF MEMPHIS.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF TENNESSEE.

FILED DECEMBER 24, 1878.

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1 WESTERN DISTRICT OF TENNESSEE.

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1875, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 6 day of April, A. D. 1876, in the following cause, to wit:

JAMES A. LOUDON, PLAINTIFF, *vs.* CITY OF MEMPHIS, DEFENDANT. } No. 243. Equity.

In the circuit court of the United States for the western district of Tennessee. In equity.

To the judges of the court:

2 James A. Loudon, who is a citizen of the State of Arkansas, brings this his bill for relief against the City of Memphis, who is a municipal corporation and a citizen of the State of Tennessee, and thereupon states and shows, that in the year 1867 the defendant and the late firm of J. and M. Loudon, composed of the plaintiff and Milton B. Loudon, who has since died, leaving the plaintiff the surviving partner of the said firm, entered into several different and distinct contracts in writing, all containing substantially the same provisions, for the regulating and paving with trap blocks or stone the carriage-way of divers of the public streets and alleys of the defendant. The said several contracts or copies of them, if required or deemed material, will be filed on or before the hearing as parts of this bill. In and by the said
3 contracts the said J. & M. Loudon, who were contractors, agreed with the defendant to furnish at their own cost all the necessary materials and labor, and in a good, firm, and substantial manner regulate and pave with stone blocks the carriage ways of the said streets and alleys, and to lay and relay the necessary curb-stones in the manner and under the conditions mentioned in the said contracts, and that the defendant or its agents might appoint such persons as they might deem proper to inspect the materials to be furnished and the work to be done under the said contracts and see that the same corresponded with the specifications set out in the said contracts, with power to reject any and all materials furnished and work done not in accordance with the contracts, and require other materials to be furnished and other work to be done in accordance therewith. The said contracts con-
4 tained a great many provisions in reference to the manner of doing the said work, not material to be repeated here, and the plaintiffs refer for them to the said contracts when produced. The said contracts further provided that the defendant, in consideration of the performance by the said J. and M. Loudon of their undertakings therein, would pay or cause to be paid to them the prices stipulated in the said contracts for the work to be done thereunder, as follows: Upon the completion of each section the said J. and M. Loudon should receive from the owner or owners of lots fronting on said section one-half the price of the same in cash, and the remaining half should be paid by the said owner or owners in thirty, sixty, and ninety days, they giving their notes therefor; the accounts for the pavement were to be made out,
5 upon the completion of each section, by the city engineer, against the property owner or owners, and delivered to the said J. and

M. Loudon for collection, and if not paid according to the terms above specified, within ten days after the said payments became due, the same, or so many as should be unpaid, should be placed in the hands of the city attorney, who should proceed to collect them under the city charter And in and by the several contracts the defendant guaranteed to the said J. and M. Loudon the payment of the said accounts, as so assessed against the property owner or owners for said pavements, according to the plan and specifications. And the said contracts further stipulated that the defendant would pay for the pavement laid down, under the same in front of the public property of the defendant, and at the intersections of the several streets and alleys, by its notes to the said
6 J. and M. Loudon to become due in twelve months from the completion of the work on each section. The said J. and M. Loudon performed their part of the said contracts in the manner and within the times therein stipulated, and the defendant accepted the work done by them as a full compliance by them with their several undertakings. At or about the same time that the said contracts were so entered into for the paving of the said streets and alleys, the firm of J. and M. Loudon and the defendant entered into one or more contracts, in writing, for regulating and paving, with trap-blocks or stone, portions of the public landing and wharf of the city of Memphis. The said contract or contracts, or copies of them, if required or deemed material, will be filed on or before the hearing as parts of this bill.

In and by the said contract or contracts the said J. and M.
7 Loudon agreed with the defendant to furnish, at their own cost, all the necessary materials and labor, and in a proper manner to regulate and pave with stone blocks the said portions of the wharf and landing to the satisfaction of the defendant or its officers and agents, all as will more fully appear by the said contracts. And the defendant agreed in consideration of the work to be done by the said J. and M. Loudon to pay them the prices stipulated in the said contract or contracts in the manner therein stated. The said J. and M. Loudon performed their part of the said contract or contracts in accordance with the requirements thereof, and the defendant accepted the work done by them as a full compliance by them with their several undertakings. After the said J. and M. Loudon had performed the paving they agreed to do in the streets and alleys and on the wharf and landing, or
8 from time to time as the work was finished, the defendant, in accordance with its contracts, gave them its negotiable notes for the sums due by it, including as well the work done in the streets and alleys, for which the defendant was primarily liable, as the work done on the wharf and landing. But no notes were given by the defendant for the portions of the said paving that was done in front of the property of individuals abutting the streets and alleys paved, which, according to the terms of the contracts, was chargeable primarily upon the said property or the owners.

A list of the said notes so given is herewith filed as a part of this bill, and is marked Exhibit A, dan the original notes are
Ex. A. in the possession of the defendant, or have been destroyed by it. In order to cary on the work of paving the streets and
9 alleys and the wharf and landing, as stipulated in the said contracts, large sums of money to pay for labor and for materials were required as the work progressed. The firm of J. and M. Loudon had not the money necessary, and were forced to borrow large sums at high rates of interest for the purpose of carrying on the work. They contracted the loans that were necessary on the best terms they could

obtain, relying confidently on the defendants paying them promptly and fully as it agreed in and by the said contracts to do. All these facts the defendant and its officers and agents were fully informed of when the contracts were entered into, and afterwards during the progress of the work and after its completion. But the defendant wholly disregarded its undertakings. It paid very little, if anything, of what it agreed to pay according to its contracts. It wholly neglected
10 to take up its notes when due, though it well knew that J. and M. Loudon were being eaten up, financially, by the interest on the sums they had borrowed to carry on the work, and knew further that the said money had been borrowed on the faith of its paying what it agreed to pay promptly at maturity. After waiting for many months after the said notes had all fallen due, and exhausting persuasion and entreaty, and finding all their efforts fruitless, J. & M. Loudon, as a last resort, and with a view of saving themselves, if possible, from the utter ruin which the payment of the large sums of interest they had put themselves under the obligation to pay in order to carry out the said contracts for paving, at last brought an action at law in the first circuit court of Shelby County on the unpaid notes of the defendant given them for the paving done as aforesaid. The suit was brought on the 8th
11 day of December, 1870. The defendant appeared and contested the right of recovery; but finally, on the 4th day of November, 1871, the said court in the said suit rendered a judgment in favor of J. and M. Loudon, or, rather, by agreement of the parties, four several judgments against the defendant for the sum of sixty-four thousand six hundred and thirty-one dollars and eighteen cents ($64,631.18) and costs, and awarded executions. At the time the said judgments were so rendered the necessities of the said J. and M. Loudon had become such that they were paying from one to two per cent. per month for the money they were borrowing, and could not obtain it at a lower rate. And they had been compelled to pledge as collateral security for the loans, or some of them, the defendant's notes which they had brough' the suit upon.
12 The defendant was informed of all these facts, and four judgments were rendered, instead of one, by the agreement of the defendant, in order to enable J. and M. Loudon to substitute the judgments with the parties from whom they had borrowed money as collateral security in the place and stead of the notes represented by the judgments.

It was necessary for them to effect this arrangement in order to get possession of the notes and surrender them on the taking of the judgments. And on the very day the said judgments were so rendered, and in the same entry of record, the largest one of the four, being for $32,084.87, was assigned by J. and M. Loudon to P. C. Bethell, from whom they were then borrowing money, as collateral security for the loan he had made them. And very shortly afterwards other as-
13 signments of others of the said judgments were made for like purposes. All these facts the defendant was informed of and knew. Still the defendant made no payments upon the said judgments; and though executions were issued for the purpose of collecting them, the defendant had no property subject to execution, and the writs were returned accordingly, leaving the said judgments unsatisfied. The defendant further, in effect, claimed and acted apparently upon the assumption that it could not be compelled to pay the said judgments, and that it would pay just as and when it chose to do so, and not before. J. M. Loudon endured this condition of affairs till about the month of September, 1872, and in the mean time what the defendant owed them

on the judgments was gradually but very certainly being con-
14 sumed by the very heavy rates of interest they were paying for the money they had borrowed. And this fact the defendant and its officers and agents well knew. Wearied with waiting fruitlessly for the payment voluntarily by the defendant of what it justly owed them as appeared by the said judgments, and for the payment of the debts, not in judgment, to be mentioned further on, J. and M. Loudon were forced and obliged by their necessities and by the unconscionable course the defendant had pursued and was pursuing towards them to enter into the arrangement which the plaintiff will now proceed fully to explain.

It has already been stated that the defendant guarantied the payment to J. and M. Loudon of the accounts against the respective owners of the property abutting the streets and alleys paved by them, under
15 the contracts first herein mentioned, according to the terms stipulated for the payment of the same in the said several contracts. A good many of the said property-owners did pay the accounts against them to the said J. and M. Loudon; others refused wholly to pay what was assessed against them, or any part thereof. Litigation sprung up between the defendant or other contractors who had laid down the Nicholson pavement in the streets and alleys of the defendant under contracts exactly similar to those under which J. and M. Loudon had laid down the said pavement, on the one side, and the owners of the property abutting the streets and alleys paved, or certain of them, on the other, as to whether the said owners or their property could lawfully be charged with or made to pay the amounts assessed upon them as appeared by the
16 accounts made out against them under the said contracts. The supreme court of the State of Tennessee, about May or June, 1872, finally decided that the act of the legislature, and the ordinances of the defendant, which attempted to authorize the charging of the cost of the said pavement upon the property abutting the street or alley paved, or the owners thereof, as had been attempted by the contracts for the laying of the Nicholson pavement, which as before stated, were similar to the contracts aforesaid between the defendant and J. and M. Loudon, were unconstitutional, null, and void, and that the payment of the accounts made out under the said contracts against the abutting property or the owners thereof could not be enforced.

The effect of the said decision was, as the defendant well knew, to hold that J. and M. Loudon could not collect the accounts due them from the property abutting the pavement they had laid down, or the own-
17 ers thereof. The accounts against the said abutting property, or the owners thereof, so due the said J. and M. Loudon, and so remaining unpaid, had been due since the years 1867 or 1868, or certainly since the year 1869, as all the work done by them under the said contracts had been completed in the years 1867 or 1868, or in the early part of 1869. And notwithstanding the defendant had become liable to pay the said accounts to the said J. and M. Loudon immediately on the failure or refusal of the property owners to pay them, as stipulated in the said contract, and had no right to insist on the suing out or exhaustion of the said property owners, or their property, as a condition precedent to its obligation to pay the said accounts, it had not up to September, 1872, paid J. and M. Loudon any of the said accounts against the
18 abutting property or the owners thereof, or anything on the said accounts. On the contrary, notwithstanding its liability to make immediate payment, and the necessitous and helpless condition of J. and M. Loudon, the defendant had not only not paid the said accounts or

any of them, but it had persistently and constantly denied its obligation to pay them, and had expressed or at least intimated its intention to suffer a litigation before it would pay the said accounts. The balance due in September, 1872, by the defendant to J. and M. Loudon on the said accounts so guarantied by the defendant was over thirty thousand dollars, besides interest. Besides on the 22d day of October, 1870, the defendant and J. and M. Loudon had entered into a contract, in writing, for the regulating and paving with trap blocks or stone the alley next north of Jefferson street from Second street to Fourth street, and
19 the alley next north of Court street from Second street to Fourth street. The said contract, or a copy, if required or deemed necessary, will be filed on or before the hearing as a part of this bill.

The said contract contained substantially the same provisions in reference to the charging of the cost of the paving to be done thereunder on the abutting property, or the owners thereof, that were contained in the contracts first herein mentioned. But for certainty and particularity reference is here made to the said contract. The defendant stipulated to pay in its notes, at the completion and acceptance of the work, for the paving done at the intersections of streets and alleys. But the contract differed from the said first mentioned contracts in this, it contained an express provision that the defendant would not be responsible for the payment of the accounts against the property owners for the pav-
20 ing laid down in front of their property, and should not be put to any cost or attorneys' fees, or expenses of any kind in effecting the collections of the property owners. J. and M. Loudon had entered into the said contract on the faith of the constitutionality and legality of the act of the legislature and the ordinances of the city authorizing the same, and on the validity of the contract of the defendant that the owners of the property abutting the pavement laid down should pay for the same according to the assessments made upon them respectively under the said contracts. When the supreme court decided that the said accounts could not be collected of the owners of the abutting property, J. and M. Loudon had completed the work under the said contract, and the defendant had accepted and was in the possession and enjoyment of the same. Some of the owners of the abutting property had paid the
21 amounts charged to them, but others had refused to pay their proportions. The amount due in September, 1872, from the owners of the said abutting property for work done under the said contract was seven thousand eight hundred and thirty-three dollars and thirty-six cents ($7,833.36), besides interest. The property owners, availing themselves of the decision that they were not liable, refused to pay the sums charged to them, and when J. & M. Loudon asked for payment from the defendant, or its officers or agents, they were referred to the provision in the contract which exonerated the defendant from liability for the sum due from the property owners, and were given to understand that the defendant would insist on the benefit of the provision. It thus looked as if J. and M. Loudon were on the point of losing
22 entirely compensation for the very valuable work they had done for the defendant, of which it had received and was receiving and enjoying the benefit. Under these circumstances it was agreed, substantially, between J. & M. Loudon and the defendant, or its officers or agents, as follows: That the amounts due J. & M. Loudon for pavement laid down in front of the property of individuals should be ascertained, and that interest should be calculated on it at the rate of six per centum per annum; that the defendant should deliver and the said J. and M. Loudon would accept the bonds of the defendant dated November,

1870, and due thirty years after date, known as the "gold funding bonds," at their face or nominal amount in payment of the principal and interest of the amount so found to be due them; and that, in consid-
23 eration thereof, the defendant would, on or before the 1st day of March, 1873, then next ensuing, pay fully, both principal and interest, the said four judgments so rendered on the 4th day of November, 1871, in favor of J. and M. Loudon and against the defendant, and to that end would set apart and appropriate exclusively for the purpose a sufficient proportion of the general tax previously levied, or then about to be levied for the year 1872, to pay the said judgments, and would provide and guaranty that the said proportion of the said tax so to be set apart should not be used for anything but the payment of the said judgments. The plaintiff files with and as a part of this bill a duly certified copy of the record of the proceedings of the general council of the defendant, evidencing the said agreement so en-
24 tered into between the defendant and J. and M. Loudon, and
Ex. B. marks the same Exhibit B.

The plaintiff states and shows that the said J. and M. Loudon were forced by the condition in which they were placed, and by the wrongful and unjust failure or refusal of the defendant to perform its obligations to them, moral as well as legal, as the same have been hereinbefore set out, to agree to the said arrangement, and that they did so because they saw in no other direction the relief they were so much in need of from their pressing debts. And the plaintiff states and shows that the said bonds of the defendant, which they so agreed to accept in payment of the debt due them for the paving laid down by them, were at the time worth only about fifty cents on the dollar, or one-half
25 of their nominal value, a fact that was then well known both to J. and M. Loudon and the defendant. And there was then, as was also understood between the parties, very little prospect that the said bonds would increase in value, but a decided probability that they would greatly decrease, as they have since done.

The only inducement to the said J. and M. Loudon to make the said concessions, and suffer the heavy loss that the arrangement would necessarily entail upon them, was the promise and undertaking by the defendant that it would certainly pay the whole of the said four judgments by the time mentioned in the agreement, as hereinbefore stated, and would adopt the specified measures and faithfully carry them out, in order to certainly assure the said payment. But for the undertaking to pay the said judgments, and but for their firm and implicit
26 reliance upon the good faith of the defendant, in making the promise, and its ability to perform the same, the said J. and M. Loudon would never have accepted the said bonds at their face or nominal value as a satisfaction of the debt due them. And this fact the defendant and its officers and agents must necessarily have known at the time. In pursuance of the said arrangement the defendant and J. and M. Loudon on the 16th day of September, 1872, ascertained and fixed that the defendant was indebted to J. and M. Loudon on that day for paving done by them on the streets and alleys under the contracts first entered into, as hereinbefore stated, in the sum of thirty thousand and forty dollars and sixty-two cents ($30,040.62) of principal, and the further sum of seven thousand one hundred and forty-seven dollars and forty-six cents ($7,147.46), the interest thereon to that date, mak-
27 ing together the sum of thirty-seven thousand one hundred and eighty-eight dollars and eight cents ($37,188.08).

And they further settled that the defendant was indebted to them for

paving done by them on the said two alleys under the last mentioned contract, as of the said day, in the sum of seven thousand eight hundred and thirty-three dollars and thirty six cents ($7,833.36) of principal and the further sum of three hundred and forty-six dollars and forty-five cents ($346.45), the interest thereon to that date, making together the sum of eight thousand one hundred and seventy-nine dollars and eighty-one cents ($8,179.81). And the parties further agreed that the whole amount due on the work under the said two contracts or sets of contracts, including interest, was on the said 16th day of September, 1872, forty-five thousand three hundred and sixty-seven dollars and eighty-nine
28 cents ($45,367.89). The defendant thereupon, as had been agreed upon, delivered to J. and M. Loudon in payment of the amount that had been so settled as the amount due them on the said account, forty-five (45) of its bonds, each for one thousand dollars, of the issue known as the "gold funding bonds" of 1870, numbered consecutively from 256 to 300, each inclusive, dated November 1st, 1870, and due thirty years after date, with interest at the rate of six per cent. per annum, payable semi-annually on the 1st days of May and November in each year during the currency of the bonds, in gold coin, for which coupons maturing each half year were attached, beginning with the coupons to fall due on the 1st day of November, 1872, and ending with the coupons to fall due at the maturity of the bonds, and also the sum of three hundred and sixty-seven dollars and eighty-nine cents ($367.89) in money, mak-
29 ing together the said sum of forty-five thousand three hundred and sixty-seven dollars and eighty-nine cents, ($45,367.89).

The plaintiff files with and as a part of this his bill a copy of the account of J. and M. Loudon for the paving done, as finally settled and agreed upon between them and the defendant, and a copy of the receipt given by them for the said bonds and money, in payment of the amount due upon the said account, both duly certified by the city comp-
Ex. C. troller, and marks the same Exhibit C.

Previously to the making of the said arrangement the defendant had passed an ordinance levying a tax of one per centum on the assessed value of all the taxable property in the city of Memphis for the purpose of defraying the expenses necessarily incurred in administering
30 the affairs of the city, which ought to have yielded about three hundred thousand dollars of money, and would have done so if properly collected. It was three-tenths of the sum to be raised by the tax so levied that was set apart under the said arrangement for the payment of the judgments in favor of J. and M. Loudon. And the sum so set apart ought to have been much more than sufficient, and if collected and so applied, would much more than have paid the said judgments. And the defendant had also, as it had authority to do, previously, by ordinance, declared all the taxes assessed for the year 1872, the 45th corporate year, due and payable from and after the 1st day of July, 1872. Relying upon these facts J. and M. Loudon accepted the said arrangement under the firm belief that the money due them in the said judgments would be fully paid them before or certainly by the 1st
31 March, 1873, the day fixed for the payment of the same, and the plaintiff believes and avers that the same would have been paid within the same time had the defendant carried out in good faith and to the extent of its ability its part of the said arrangement.

At the time of effecting the said arrangement one object of the said J. and M. Loudon, as the defendant understood and knew, was to get further extensions of the loans they were carrying, as before stated, by using the bonds received from the defendant with their creditors as col-

lateral security, in addition to the security they already held, for the repayment of the sums loaned and the accruing interest. And, after receiving the bonds, J. and M. Loudon did, as was contemplated, use them, or most of them, as collateral security for the loans they had contracted, expecting that very soon they would realize the money
32 due them on the judgments, and would thereby be enabled to redeem the said bonds, and could then hold them as a safe, permanent investment, which they contemplated doing. But the defendant wholly failed to carry out its part of the said arrangement; it did not set apart and appropriate three-tenths of the said tax, and pay the money realized from the same on the said judgments, from time to time, as the money was collected; it wholly failed to do so, but used the money collected for other and different purposes. Very shortly after the rendition of the said judgments J. and M. Loudon had agreed with their attorneys upon the amount of fees they should charge them for services in prosecuting the suit and obtaining the judgments; and by some arrangement between the defendant and the said attorneys the
33 amounts of the fees due the attorneys were credited on the said several judgments respectively on the 4th day of December, 1871, and, as the plaintiff supposes, were at or about that time paid to the said attorneys; with the exception of the payments so made, J. and M. Loudon received no money on the said judgments till about the 14th January, 1873, and then received only $1,500.00. The next payment was $919.00 on the 1st February, 1873, and the next of $4,000.00 on the 1st April, 1873. Other payments were made at intervals up to the 7th day of January, 1874, since which time no payments whatever have been made. A list of the said payments, showing all that have been made, and the amounts and dates of each payment, is filed with and as a part of this bill, and is marked Exhibit D.

Most of the said payments were made to the creditors of the
34 said J. and M. Loudon, to whom the said judgments had been pledged as collateral security for loans; and in many instances money was not paid, but, in order to obtain the payments, arrangements had to be made, and frequently at a sacrifice, to J. and M. Loudon, to pay the taxes due by other parties to the defendant, with portions of the judgments, and credit the judgments by the amounts so paid. All the efforts of J. and M. Loudon to obtain payment of the said judgments, except as above shown, were unavailing, though they and others for them made many efforts. When the taxes for 1873, the 46th corporate year, came to be levied, which was about the 21st July, 1873, the defendant fixed the rate at one dollar on the hundred dollars of taxable property for the purpose of defraying the expenses necessarily
35 incurred in administering the affairs of the city, with the view, as the plaintiff was informed at or about the time, of setting apart three-tenths of the said levy, or so much thereof as might be necessary, to pay any deficiency that there might be in the amount set apart out of the taxes of the previous year, 1872, as hereinbefore stated, for the payment of the judgments of J. and M. Loudon; and by the ordinance levying the tax, the defendant made the same due and payable on the 1st day of August, 1873. The ordinance did not, as the ordinance of 1872 had done, declare that the said proportion of the said tax for 1873 was set apart and appropriated for the payment of the said judgments, but J. and M. Loudon were assured by members of the defendant's general council that such was the fact, and that the general council's
36 finance committee so understood when it recommended the fix-

ing of the rate of taxation at one dollar on the hundred dollars, as above stated.

As J. and M. Loudon had, up to this time, been disappointed in obtaining payment of their said judgments, they were again induced to hope for and depend upon the payment of their said judgments out of the said tax for the year 1873, and in the prospect of the payment to continue the struggle to keep up their loans and pay the interest thereon, but no payments were made out of the said tax for 1873, except those contained in the list made, Exhibit D, hereto, which may have been made out of the same.

The defendants, after the installation of the officers elected at the election in 1874, not only failed to pay J. and M. Loudon anything on their said judgments, but refused to admit that they had any
37 right to have the three-tenths of the taxes for 1872, which had expressly been set apart for the purpose, or any portion of the tax for 1873, devoted or applied to the payment thereof. On the contrary, the defendant declined paying the said judgments, or any part of them, and in entire disregard of the rights of J. and M. Loudon under the arrangement of 16th September, 1872, used and appropriated all the taxes collected by it both for 1872 and 1873 for purposes other and different from the payment of the said judgments. J. and M. Loudon, supposing that they had rights in the premises which the courts of the State of Tennessee would respect and enforce, applied by petition to the first circuit court for a writ of mandamus, stating the facts, and asking that the defendant be compelled to pay them the amount due on the
38 said four judgments, or in default thereof, that it specially set apart and appropriate thirty cents of each dollar of taxes collected for the 45th and 46th corporate years, 1872 and 1873, or so much thereof as might be necessary, or some other specific part of the revenue, sufficient in amount for the sole and exclusive purpose of paying the said four judgments, and pay over the same from time to time as collected until the said judgments should be fully satisfied. An alternative writ of mandamus was issued on the said petition, but the defendant appeared and filed its demurrer to the writ, thereby admitting the statement of facts therein, and on the hearing of the demurrer the circuit court sustained the same and dismissed the petition and refused the peremptory writ of mandamus. J. and M. Loudon then appealed to the supreme court of the State of Tennessee, where, subsequently, in the year
39 1875, the judgment of the circuit court was affirmed. A transcript of the record of the said suit will be filed with and as a part of this bill on or before the hearing if the same be deemed material or be required. When the defendant came to levy taxes for the 47th corporate year, 1874, it wholly disregarded any obligation it was under to provide for the judgments of J. and M. Loudon, and made no provision whatever for the same, and has never since manifested the least concern as to their payment. In December, 1873, being worn out with waiting and exhausted by the heavy interest they had been compelled to pay, J. and M. Loudon were forced to sell the judgment for $11,546.00 at a discount, losing thereon the sum of twelve hundred and forty-three dollars ($1,243.00).

Before selling the said judgment, J. and M. Loudon had paid,
40 as interest on the debt the same was pledged as collateral to secure, the sum of one thousand dollars ($1,000.00); and they were forced to make the said sale because the creditor to whom the said debt was due would give no further time, and the defendant would not pay any money on the judgment.

J. and M. Loudon were thus enabled to bridge over till June, 1874, when they were forced to sell at a discount the judgement for $32,084.87 and thereby lost the sum of five thousand dollars ($5,000.00). Before selling the said judgment J. and M. Loudon had paid, as interest on the debt the same was pledged as collateral to secure, the sum of three thousand dollars ($3,000.00). And they were forced to make the said sale because the creditor to whom the said debt was due would give no further time, and the defendant would not pay the money on the
41 judgment. The firm of J. and M. Loudon, or the plaintiff as surviving partner, retain only the judgments for $11,000.00, and $10,000.00 and the balances due on them, as shown by Exhibit D, remain unpaid, and the defendant refuses to pay them; and in order to compel payment the plaintiff has been forced to bring an action on them in this court, which is now pending and undetermined. J. and M. Loudon and the plaintiff, as surviving partner, have been compelled to pay very large amounts of money as interest on the debts they owed, which the said two judgments were, from time to time, used as collateral to secure. A statement of the amounts so paid will be filed as a part of this bill on or before the hearing. The payment of the said interest was made necessary by the refusal of the defendant to pay the said judgments, and J. and M. Loudon and the plaintiff would have been relieved thereof at any time upon the payment by the defendant
42 of what it owed.

In consequence of the failure of the defendant to pay the said judgments, J. and M. Loudon, after paying for a long time heavy rates of interest on the moneys due by them, secured by the pledge of the defendant's bonds which J. and M. Loudon had taken under the arrangement aforesaid, were forced for the purpose of paying and discharging the said debts to sell the said bonds. They made the best sales they could, but realized thereby only about fifty cents, or less, in money for a dollar in bonds. In this way J. and M. Loudon were compelled to sell, and did sell, all but about eight of the said bonds, and in consequence of such sales J. and M. Loudon lost on the said bonds, or the debt the same had been taken in lieu of, fifty per cent. or one-half. Such loss was the direct and necessary result of the breach by the defendant of its undertaking to pay the said judgments, as before
43 stated, and of its duty to pay them independent of any agreement. The large amount of interest J. and M. Loudon paid on this debt the bonds were pledged to secure before the sale of the bonds, as just stated, was also a loss to J. and M. Loudon entailed upon them by the said wrongful conduct of the defendant. Not only has the defendant refused to do anything voluntarily towards the payment of the said judgments, but it has procured a decision from the first circuit court of Shelby County that it cannot be compelled to levy a tax for the payment of the same. This decision the defendant procured an affirmance of by a tribunal which exercised the functions of the supreme court of Tennessee in the year 1875, known as the "arbitration court." Taken in connection with the decision that J. and M. Loudon could not compel the performance of the defendant's part of the arrangement under which J. and M. Loudon had accepted the
44 said forty-five (45) bonds, the said decision practically fixed the fact that J. and M. Loudon had not, through the courts of the State of Tennessee, any remedy for the collection of the said judgments, nor any way of forcing the defendant to perform its contracts. But the defendant was not content with its apparently impregnable position, so fortified, and so it procured the legislature of the State of Tennessee to

repeal an act, passed by the legislature in March, 1873, which gave power to its general council to levy a tax, in addition to all other taxes, sufficient in amount to pay the entire cost of the pavement that had been laid down under contracts, charging the cost of the pavement on the property abutting the same, or the owners thereof. It had been supposed that this act of the legislature might possibly be of assistance to J. and M. Loudon in collecting the balance of the judgments
45 due them, and the plaintiff believes and charges that its repeal was in part procured to defeat them in making the collection. By reason of the premises, J. and M. Loudon were not only deprived of all profits on the labor performed by them for the defendant, but they were deprived even of compensation, and have been well-nigh reduced to absolute bankruptcy. The plaintiff claims that in justice and equity he is entitled, as the surviving partner of the said firm, to recover of the defendant the following sums:

(1.) The sum of forty-five thousand dollars due J. and M. Loudon by the defendant on the 16th day of September, 1872, for paving done in front of the property of individuals, and interest thereon, less the prices at which J. and M. Loudon sold the forty-five of the defendant's bonds received by them under the arrangement of the 16th September, 1872, or the market value of the said bonds, and interest thereon.
46 The plaintiff is advised that it is not necessary for him, under the circumstances herein detailed, to return or offer to return the said bonds, or other bonds instead of them, especially as the failure by the defendant to perform its contract and its duty forced J. and M. Loudon to dispose of the said bonds, and put them, or the most of them, beyond their control. The plaintiff, however, should the court be of opinion that it is his duty to do so, hereby offers to return to the defendant the said forty-five bonds so delivered him by the defendant under the said arrangement. But, before he is required to do so, the plaintiff submits that the defendant ought to be required to place in his hands a sufficiency of the money it owes him to pay for the said bonds.

(2.) The plaintiff also claims that the defendant ought to repay to him the interest on the money J. and M. Loudon were forced to bor-
47 row by the failure of the defendant to pay them the sums it became liable to pay them under the before mentioned several contracts from time to time, as the same became due, or at least so much of the said interest as exceeded six per centum per annum, which was the rate at which interest was calculated in arriving at the sums that the defendant owed J. and M. Loudon. And in the interest so to be paid ought to be included the interest paid by J. and M. Loudon on the money borrowed by them before the judgments were rendered, as well as that borrowed afterwards, and the interest on the money borrowed after the judgments were rendered, and before the arrangement of the 16th September, 1872, as well as that borrowed afterwards.

(3) And the plaintiff claims, lastly, that the defendant ought to
48 be required and forced to make good to him the several sums J. and M. Loudon lost by the sales of the judgments against the defendant, which they were forced to sell, as has been hereinbefore fully set forth. The plaintiff is advised that he has no remedy for the several grievances herein detailed in a court of law, and that he can have adequate relief only in a court of equity. In consideration of the premises, the plaintiff prays that process may issue against the defendant the City of Memphis, requiring it to appear and answer this bill; that a decree may be pronounced setting aside and vacating the settlement of the 16th Sep-

tember, 1872, so far as it interferes with the recovery by the plaintiff herein; that the defendant may be decreed to pay the plaintiff all that in justice and equity it ought to pay him by reason of the facts stated in this bill, and that the proper accounts for the purpose of
49 ascertaining the same may be taken and stated under the direction and order of the court; that the defendant may be compelled by proper process to pay the sums it may appear to owe, and that the plaintiff may have all other, proper, just and necessary relief.

And as in duty, &c.

RANDOLPH, HAMMOND AND JORDAN.
Sol's for Jas. A. Loudon.

(Endorsed:) No. 243. Circuit court of the United States, western district of Tennessee. James A. Loudon vs. City of Memphis. Original bill. Filed April 6, 1876. H. E. Andrews, clerk. L. H. Pillsbury, D. C.

50 Date of note.		No.	On what account.	To whom delivered.	Amount.
Feb'y	22	1612	Front street, paving	J. & M. London	1,000
"	"	1613	" " "	" " "	1,000
"	"	1615	" " "	" " "	1,000
"	"	1616	" " "	" " "	1,000
"	24	1620	Wharf & landing	" " "	1,000
"	"	1622	" "	" " "	1,000
May	7	1649	Front street, paving	" " "	269 64
"	"	1650	" " "	" " "	500
"	"	1651	" " "	" " "	500
"	"	1652	" " "	" " "	500
"	"	1653	" " "	" " "	500
"	"	1654	" " "	" " "	500
"	"	1655	" " "	" " "	500
"	"	1656	" " "	" " "	500
"	"	1657	" " "	" " "	500
"	"	1658	" " "	" " "	500
"	"	1659	" " "	" " "	500
"	"	1660	" " "	" " "	500
"	"	1661	" " "	" " "	500
"	"	1663	" " "	" " "	500
"	"	1664	" " "	" " "	500
June	8	1682	" " "	" " "	1,000
"	"	1684	" " "	" " "	1,000
"	"	1686	" " "	" " "	1,000
"	"	1687	" " "	" " "	1,057 77
"	"	1688	" " "	" " "	1,000
July	"	1695	" " "	" " "	1,000
"	"	1699	" " "	" " "	1,000
"	"	1701	" " "	" " "	1,000
51 July	8	1702	Front st. paving	J. & M. London	1,240 13
Oct.	13	1737	Center alley "	" " "	481 49
Dec.	7	1744	Wharf & landing "	" " "	1,400
"	"	1745	" " "	" " "	1,000
"	"	1746	" " "	" " "	1,000
"	"	1747	" " "	" " "	1,000
"	"	1748	" " "	" " "	1,000
"	"	1749	" " "	" " "	1,000
"	"	1750	" " "	" " "	1,000
"	23	1757	" " "	" " "	500
"	"	1759	" " "	" " "	500
"	"	1760	" " "	" " "	500
"	"	1761	" " "	" " "	500
"	"	1762	" " "	" " "	500
"	"	1763	" " "	" " "	500
1869					
Jan'y	14	1767	" " "	" " "	500
"	"	1768	" " "	" " "	500
"	"	1769	" " "	" " "	500
"	"	1770	" " "	" " "	500
"	"	1771	" " "	" " "	500
"	"	1772	" " "	" " "	500
"	"	1773	" " "	" " "	500
"	"	1774	" " "	" " "	500
"	"	1775	" " "	" " "	500
"	"	1776	" " "	" " "	500
"	"	1777	" " "	" " "	500
"	"	1778	" " "	" " "	660
"	"	1779½	" " "	" " "	500
June	1	1823	" " "	" " "	662 50

52 Date of note.	No.	On what account.	To whom delivered.	Amount.
June 19	1824	Streets & alleys, paving	J. and M. Loudon	500
" "	1825	" " "	" " "	500
" "	1826	" " "	" " "	500
" "	1827	" " "	" " "	500
" "	1828	" " "	" " "	500
" "	1829	" " "	" " "	500
" "	1830	" " "	" " "	500
" "	1832	" " "	" " "	500
" "	1833	" " "	" " "	500
" "	1834	" " "	" " "	500
" "	1835	" " "	" " "	500
" "	1836	" " "	" " "	500
" "	1837	" " "	" " "	500
" "	1840	" " "	" " "	500
" "	1842	" " "	" " "	886 40
July 27	1871	" " "	" " "	463 48
Aug. 12	1875	" " "	" " "	500
" "	1876	" " "	" " "	500
" "	1880	" " "	" " "	684 08
" "	1881	" " "	" " "	*500
" "	1882	" " "	" " "	*500
" "	1883	" " "	" " "	*500
" "	1884	" " "	" " "	*500
" "	1885	" " "	" " "	*500
" "	1886	" " "	" " "	*500
" "	1887	" " "	" " "	*500
" "	1888	" " "	" " "	*500
" "	1889	" " "	" " "	*500
" "	1890	" " "	" " "	*500
53				
Oct. 2	1911	Wharf & landing pavem't	J. and M. Loudon	634 32
" "	1912	" " "		634 32

*These notes fell due Oct. 6, 1869.

RECAPITULATION.

Streets and alleys	36,062 99
Wharf and landing	20,991 14
Total	57,054 13

(Endorsed:) No. 243, circuit court of the United States, western district of Tennessee. Jas. A. Loudon vs. The City of Memphis. Exhibit A, bill. Filed Apr. 6, 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C.

54 Whereas J. and M. Loudon propose to accept the thirty-year gold-bearing bonds of the city at par in payment of the sum remaining due them for paving with stone certain streets and alleys of the city; and whereas the judgments against the city in favor of the said J. and M. Loudon on notes given for paving portions of the wharf, now amounting to something over seventy thousand dollars, were estimated to be provided for by the taxes to be collected for the present year: Therefore,

Resolved by the general council of the city of Memphis, That the mayor be, and is hereby, authorized to deliver to the said J. and M. Loudon a sufficiency of the said bonds at par to pay the said indebtedness for paving the streets and alleys.

Resolved further, That three-tenths of the amount that may be collected upon the tax levied for the present year for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, or so much thereof as may be necessary for the purpose,

55 be, and the same is hereby, appropriated and set apart for the payment of the said judgments, and shall be paid on said judgments according to priority in date, from time to time, as collected.

Adopted by board of aldermen August 8th, 1872. Referred by council to their finance and ways and means committee August 9th, 1872.

Report finance and ways and means committee upon the proposal of J. and M. Loudon to accept the thirty-year gold-bearing interest bonds of the city at par in payment of their claims against the city for stone paving, &c., &c., and the accompanying resolution adopted by board of aldermen August 8th, 1872, but referred by council to their finance and ways and means committee August 9th, 1872.

Your finance and ways and means committee report favorably.

(Signed) JAMES F. SCHABEL,
Chairman Common Council Committee.

Report read, received, and adopted by council September 4th, 1872.

CITY REGISTER'S OFFICE,
Memphis, Tenn., November 24th, 1874.

56 I hereby certify that the foregoing copy of the proceedings of the general council on the subject therein named, as the same appears of record in my office, is correctly copied from the said records.

Witness my hand and seal of office this 24th day of November, 1874.

[L. S.] M. T. WILLIAMSON,
City Register.

(Endorsed:) No. 243. Circuit court of the United States, western district of Tennessee. J. and M. Loudon vs. The City of Memphis. Exhibit B to bill. Filed Apr. 6, 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C.

57 RECAPITULATION.

Balance due under original contract:

	Principal.	Interest.
	$30,040.62	7,297.66
Less 30 days' interest on	$30,040.62	150.20
	$30,040.62	$7,147.46
Due under last contract	7,833.36	395.41
Less 37½ days' interest on	7,833.36	48.96
	$7,833.36	$346.45

Total amount, $45,367.89.

STATE OF TENNESSEE,
County of Shelby, City of Memphis:

M. B. Loudon, being duly sworn, says that the foregoing statement of account of J. and M. Loudon with the city of Memphis is just and correct; that the work therein charged for was performed by the said J. and M. Loudon under the several contracts made by them with the city of Memphis for the paving of certain streets and alleys of the city, and

that the prices charged for the said work are according to the said contracts; that all credits, including as well payments made by or
58 for property owners as payments by the city, have been allowed and deducted, and that the balance shown by the recapitulation, to wit, the sum of forty-five thousand three hundred and sixty-seven dollars and eighty-nine cents ($45,367\frac{89}{100}$) is justly due from the city of Memphis to the said J. and M. Loudon for principal and interest to the first day of May, 1872.

Subscribed and sworn to this the 16th day of September, 1872.

M. B. LOUDON.
JOHN JOHNSON, *Mayor.*

Received, Memphis, Sept. 16th, 1872, of John Johnson, mayor of the city of Memphis, forty-five (45) bonds of the city, for one thousand dollars each, of the issue known as the "gold funding bonds" of 1870, numbered from 256 to 300 each inclusive, dated November 1st, 1870, and due thirty (30) years after date, with interest at the rate of
59 six per cent. per annum, payable semi-annually on the 1st days of November and May of each year during the currency of the bonds, in gold coin, from which coupons maturing each half year are attached, beginning with the coupon to fall due on the 1st day of November, 1872, and ending with the coupon to fall due at the maturity of the bonds; and also the sum of three hundred and sixty-seven dollars and eighty-nine cents ($367.89) in money, making together the sum of forty-five thousand three hundred and sixty-seven dollars and eighty-nine cents ($45,367.89), which we accept as full payment of the balance due us by the city of Memphis for stone pavement heretofore laid down by us in the streets and alleys of the city under contracts with the city, as shown by the account and recapitulation hereto attached.

J. AND M. LOUDON.

Attest:
J. H. HUMPHREYS,
J. H. FRELIGH.

60 I hereby certify that the above recapitulation, affidavit and receipt is a true and correct copy of the original on file in this office.

JAMES A. NEWSOM,
City Comptroller.

AUG. 5TH, 1875.

(Endorsed:) No. 243. Circuit court of the United States western district of Tennessee. Jas. A. Loudon vs. The City of Memphis. Exhibit C to bill. Filed April 6, 1876. H. E. Andrews, clerk. L. H. Pillsbury, D. C.

61 First circuit court of Shelby County, Tennessee.

JAMES A. LOUDON AND MILTON B. LOUDON, partners as J. and M. Loudon,
vs.
THE CITY OF MEMPHIS.

Judgments all rendered the fourth day of November, 1871.

Judgment for	32,084 87
Costs of suit	31 75

Paid Dec. 4th, 1871		930 46
" April 1st, 1873		4,000 00
" " 7th, "		1,000 00
" Aug. 5th, "		3,000 00
" Jan'y 7th, 1874		335 00
Judgment for		11,546 31
Paid Dec. 4th, 1871		334 84
" " 24th, 1873		10,000 00
" " 31, "		1,211 47
Judgment for		11,000 00
Paid Dec. 4th, 1871		319 00
" Feb. 1st, 1873		919 00
Paid June 6, 1873		1,000 00
62 Paid July 3d, 1873		1,000 00
" Aug. 4th, "		1,000 00
" Sept. 4th, "		1,000 00
" Dec. 31st, "		2,523 40
Judgment for		10,000 00
Paid Dec. 4th, 1871		270 70
" Jan. 14th, 1873		1,500 00
" June 6th, "		1,000 00
" Aug. 9th, "		1,500 00
" " 14th, "		1,764 00
" Dec. 31st, "		209 13

(Endorsed:) No. 243. Circuit court of the United States, western district of Tennessee. Jas A. Loudon vs. The City of Memphis. Exhibit D to bill. Filed April 6, 1876. H. E. Andrews, clerk. L. H. Pillsbury, D. C.

63 The President of the United States of America to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to summon the City of Memphis, a citizen of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit for the western district of Tennessee, at Memphis, in said district, on the first Monday in May next, and then and there to answer, plead, or demur to the bill of complaint of James A. Loudon, a citizen of the State of Arkansas, filed herein April 6th, 1876.

Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court at said Memphis, this 7th day of April, A. D. 1876, and the 100 of American Independence.

[L. S.]

H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

Know all men by these presents that we, James A. Loudon and and held and firmly bound unto said defendant, the City of Memphis, in the sum of two hundred and fifty dollars, but to be void on condition that the said plaintiff do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee at said Memphis, against the said defendant; and also on failure of the said plaintiff to prosecute the said

suit with effect; and also on failure of the defendant, if convicted, to pay said costs.

Witness our hands and seals this 6th day of April, A. D. 1876.

JAS. A. LOUDON, [SEAL.]
By W. M. RANDOLPH, *Att'y.* [SEAL.]
H. LOUDON. [SEAL.]

Approved by and acknowledged before me the 7th day of April, A. D. 1876.

L. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

MEMORANDUM.—The defendant, the City of Memphis, will enter its appearance in the suit in the clerk's office on or before the day on which the above writ is returnable; otherwise the bill may be taken pro confesso.

H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

64 (Indorsement:) No. 243. James A. Loudon vs. City of Memphis. Summons. Returnable to 1st Monday in May, A. D. 1876. Randolph, H. & J., attorneys. Returned 20 day of April, A. D. 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C.

On the 8th April, 1876, I executed this writ by serving true copy hereof personally upon J. R. Flippin, as mayor of the city of Memphis, and upon S. P. Walker, as city attorney of the city of Memphis.

L. B. EATON,
U. S. Marshal.
K.

2 serv. sum. 4.00; 2 miles, 0.12—4.12.

65 In the circuit court of the United States for the western district of Tennessee. In equity.

JAMES A. LOUDON
vs.
THE CITY OF MEMPHIS.

The defendant will take notice that the plaintiff desires the evidence to be adduced in the above cause to be taken orally, as provided by the 67 rule in equity, as amended.

July 26th, 1876.

RANDOLPH, HAMMOND & JORDAN,
Sol's for Pl'ff.

To SAM'L P. WALKER.
Sol. for Def't.

(Endorsed:) No. 243. Circuit court of the United States, western district of Tennessee. James A. Loudon vs. City of Memphis.

Service of the within notice accepted this July 27, 1876.

S. P. WALKER, *City Att'y.*

Filed July 28, 1876.

L. H. PILLSBURY, *D. C.*
H. E. ANDREWS, *Clerk.*

66 In the circuit court of the United States for the western district of Tennessee.

Before Hon. H. H. Emmons, judge in vacation.

JAMES A. LOUDON
vs.
THE CITY OF MEMPHIS. } In equity.

It is ordered that S. S. Garrett, esq., be, and he is hereby, appointed an examiner of the court to take the testimony of the witnesses in the above cause under the 67th rule in equity as amended, to be read in evidence on the hearing.

H. H. EMMONS,
Cir't Judge.

I waive notice of the time and place of applying for the above order. July 26th, 1876.

S. P. WALKER,
City Att'y.

(Endorsed:) 243 A. D. James R. Loudon vs. The City of Memphis. In equity. Notice. Filed Aug. 7, 1876. H. E. Andrews, clerk.

66½ UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court at a regular term thereof, begun and held for its May term, A. D. 1876, at the United States court-house in the city of Memphis, in said district, on, to wit, the 5th day of June, A. D. 1876, in the following cause, to wit:

JAMES A. LOUDON, PLAINTIFF,
vs.
CITY OF MEMPHIS, DEFENDANT. } No. 243.

The subpœnas issued in the above entitled cause having been returned duly executed on the defendant, the City of Memphis, which return has been duly filed herein, and no appearance having been made by the defendant, or plea, or answer, or demurrer filed in said cause within the time prescribed by the rules of this court, on motion of solicitor for complainant before the clerk and master of this court on the June rule day of the year 1876, it is ordered and decreed that the bill filed herein be taken for confessed as to said defendant, the City of Memphis.

67 Circuit court of the United States for the western district of Tennessee.

JAMES A. LOUDON
vs.
THE CITY OF MEMPHIS. } 243. In equity.

In this cause, on motion of complainant, by his solicitor, it is ordered that the taking of evidence in this cause under the 67th rule as amended be commenced on the 28th day of August, 1876, at United States

court room, in the city of Memphis, and continued from day to day until all the evidence is taken. It is further ordered that ten days' notice of the time and place of taking said evidence be served upon defendant's solicitor.

Given under my hand this 15th day of August, 1876.

S. S. GARRETT,
Examiner.

(Endorsed:) N. 243. Circuit court of the United States, western district of Tennessee. James A. Loudon vs. City of Memphis.
68 Ordered to take testimony and give notice. Filed Aug. 15th, 1876. H. E. Andrews, clerk.

In the circuit court of the United States for the western district of Tennessee. In equity.

JAMES A. LOUDON
vs.
THE CITY OF MEMPHIS.

The defendant will take notice that by an order made in the above cause S. S. Garrett, esq., has been appointed a special examiner of the court, and that by his order the examination of witnesses on the part of the plaintiffs will take place before him at his office in the Shelby County court-house building in Memphis on the 28th day of August, 1876, at 10 o'clock a. m., and proceed thereafter from day to day
69 as the said examiner may direct until the testimony is all taken.

Dated August 18th, 1876.

RANDOLPH, HAMMOND & JORDAN,
Sol's for Pl'ff.

To CITY OF MEMPHIS and SAM'L P. WALKER, *City Att'y.*

(Endorsed:) No. 243. Eq. D. Circuit court of the United States, western district of Tennessee. Jas. A. Loudon vs. The City of Memphis. Notice for taking testimony. Filed Aug. 21, 1876. H. E. Andrews, clerk.

On the 18th Aug., 1876, I served true copy hereof personally on S P. Walker, as city att'y of the city of Memphis, and on 19th Aug., 1876, I served true copy hereof personally on L. C. Williamson, acting mayor of the city of Memphis.

L. B. EATON,
U. S. Marshal,
By W. KOCH, *Dep.*

Fees: 2 serv., 4.00; 2 cop., 0.50; 2 mil., 0.12—$4.62.

70 United States circuit court, western district of Tennessee.

To the marshal of the western district of Tennessee, greeting:

Having assigned Wednesday, the 5th day of September, 1877, at 2 o'clock p. m., at my office, in the city of Memphis, to take proof as examiner under the 67th rule of the Supreme Court as amended, in the cause of James A. Loudon vs. The City of Memphis, No. 243—att'y for comp't, Randolph, H., & Wassell; att'y for def't, S. P. Walker—you

are therefore hereby commanded to summon the parties in said cause or their attorney to appear at my office, in the city of Memphis, on the day and at the hour above mentioned for the purpose of attending the taking of said proof. If the taking of said proof is not completed on the day above assigned, the taking of the same will be continued from day to day until completed.

You will also notify said parties to proceed without delay to procure said testimony or the attendance of such witnesses as they may desire to introduce upon the taking of said proof.

Herein fail not, and have you then and there this writ.

Witness S. S. Garrett, examiner of our said court, at office in the city of Memphis, Tenn., this 29th day of August, 1877.

S. S. GARRETT,
Examiner.

71 (Indorsed:) No. 243. United States circuit court for western district of Tennessee. James A. Loudon vs. The City of Memphis. Master's notice, issued 29 day of August, 1877. S. S. Garrett, ex. Randolph, H., and Wassell, sol's for complainant; S. P. Walker, sol's for defendants. Returned and filed 1 day of Sept., 1877. H. E. Andrews, clerk, L. H. Pillsbury, D. C.

On 29 Aug't, 1877, I made known the contents hereof to Wassell, of Randolph, Hammond, and Wassell, and on 31 August, 1877, I made known the contents hereof to the Sam'l P. Walker, as solicitor for defendant'.

M. J. WALDRAN,
U. S. Marshal,
By A. J. GARDNER, *Dep.*

2 serv., 4.00; 2 m., 0.12—$4.12.

72 The President of the United States to William M. Sneed, James A. Newson, Benjamin Richmond, John Loudon, Fred. C. Shaper, James Cornell, H. D. Brewster, G. A. Hanson, and Thomas Fisher:

You are hereby commanded that, all business and excuses being laid aside, you appear and attend before S. S. Garrett, esq., an examiner duly appointed by the circuit court of the United States for the western district of Tennessee, in the sixth judicial circuit, and authorized to examine you as witnesses in a suit in equity depending undetermined in the said circuit court, wherein James A. Loudon is complainant and the City of Memphis is defendant, on the part of the complainant, at the United States court-rooms in the city of Memphis, Tennessee, on Wednesday, September the 5th, 1877, at 2 p. m., to answer truly all such questions as shall then and there be asked you. And for a fail-
73 ure to attend you will be deemed guilty of a contempt of court, and forfeit two hundred and fifty dollars in addition thereto.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at Memphis, Tennessee, in said district, this 29th day of August, 1877.

H. E. ANDREWS, *Clerk,*
L. H. PILLSBURY, *D. C.*

RANDOLPH, H., & WASSELL,
Att'ys for Compl't.

(Endorsed:) No. 243. United States circuit court, western district of Tennessee. James A. Loudon vs. City of Memphis. Spa. issued 29th

Aug., 1877. L. H. Pillsbury, D. C. Randolph, H., & Wassell, sol's for compl't; S. P. Walker, sol. for defendant. Ret'd & filed Sept. 1, 1877. H. E. Andrews, cl'k, L. H. Pillsbury, D. C.

WESTERN DIST. OF TENN., *Memphis, Tenn.:*

On the 29th August, 1877, I personally made known the contents of this subpœna to the within named James A. Newson and Fred. C. Schaper, and on 30th Aug. I personally made known the contents of
74 this spa. to the within named Thomas Fisher and Benjamin Richmond; and on 31st day August, 1877, I personally made known the contents of this spa. to the within named John Loudon. Wm. M. Sneed not in the city. The residence or place of business of H. D. Brewster not known. Visited Graham's Ferry, where it is reported James Cornell lives; could not find him. G. A. Hanson lives somewhere near Bartlett; had no means to go there to serve process.

M. J. WALDRON,
U. S. Marshal.

LOUDON
vs.
CITY OF MEMPHIS.

In this cause, on motion of defendant's counsel and for satisfactory reasons appearing, it is ordered that the taking of testimony in this cause be, and the same is hereby, continued until Saturday, Sept. 9, 1876.

S. S. GARRETT,
Examiner.

75 (Endorsed:) 243. United States circuit court, western district of Tennessee. Loudon vs. City of Memphis. Order of continuance. Filed Aug. 31, 1876. H. E. Andrews, clerk.

Tax ordinance.

Be it ordained by the general council of the city of Memphis, &c.:

SEC. 1. That the following rates of taxation for the following specified purposes be and the same are hereby established, and taxes according to such rates shall be levied and collected upon the taxable property within the city of Memphis, as assessed for taxation for the forty-fifth corporate year 1872, to wit:

First. For the sole and special purpose of paying the interest as the same may become due on the bonds issued or to be issued by the
76 city of Memphis. One dollar on each one hundred dollars' worth of property as assessed for taxation in the old city limits, comprised in the first, second, third, fourth, fifth, sixth, seventh and eighth wards of the city; and for the sole and special purpose of paying the said interest, fifty cents on each one hundred dollars' worth of property assessed for taxation in the limits of the addition made to the city by the act of 1867 comprised in the ninth and tenth wards.

Second. For the sole purpose of providing a sinking fund to be used in retiring the bonds of the city, as the same may become due; twenty cents on the one hundred dollars' worth of taxable property in the old city limits as above defined,, and ten cents on the one hundred dollars' worth of taxable property in the addition to the city of Memphis, made by the act of 1867 as above defined.

Third. For the purpose of defraying the expenses necessarily
77 incurred in administering the affairs of the city, one dollar on the

one hundred dollars' worth of taxable property within the limits of the city.

Fourth. For the support of the public schools of the city, thirty cents on the one hundred dollars' worth of taxable property in the city limits.

SEC. 2. That the taxes for the forty-fifth corporate year shall be due and payable on and after the first day of July, 1872.

SEC. 3. That this ordinance take effect and be in force from and after its passage.

Passed first reading by the board of alderman, July 3, 1872, when, on motion, under the provisions of the 14th section of the city charter, the rules of the board in relation to the passage of city ordinances were suspended, and the ordinance read a second time, and passed finally.

Passed first reading by common council July 3, 1872. Thereupon, on motion, the rules of the common council in relation to the passage
78 of ordinances were, in conformity to the provisions of the 14th section of the city charter in relation to the passage of city ordinances, suspended; when the ordinance was read a second time, and passed finally by the common council July 3, 1872. The above is a true and correct copy of the ordinance levying the tax for 1872 as shown by record book, volume No. 1, in city register's office.

M. T. WILLIAMSON,
City Register,
P'r A. J. McLOUDON, *Dep't.*

(Endorsed:) No. 243. United States circuit court, western district of Tennessee. J. A. Loudon vs. The City of Memphis. Copy of ordinance levying taxes for 1872. Filed Sept. 14, 1876. H. E. Andrews, clerk.

79 *Ordinance.*

Be it ordained by the general council of the city of Memphis:

SEC. 1. That the following rates of taxation for the following specified purposes be, and the same are hereby, established, and that taxes according to such rates shall be levied and collected upon the taxable property within the city of Memphis, as assessed for taxation, for the forty-sixth corporate year (1873), to wit:

First. For the sole and special purpose of paying the interest, as the same may become due on the bonds issued or to be issued by the city of Memphis, one dollar on each one hundred dollars' worth of property as assessed for taxation, in the old city limits, and for the sole and special purpose of paying the said interest, fifty cents on each one hundred dollars' worth of property, as assessed for taxation in the limits of the addition made to the city by the acts of 1867.

80 Second. For the sole purpose of providing a sinking fund to be used in retiring the bonds of the city, twenty cents on the one hundred dollars' worth of taxable property in the old city limits, and ten cents on the one hundred dollars' worth of taxable property in the new limits added there by the act of 1867.

Third. For the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, one dollar on the one hundred dollars' worth of taxable property in the city limits.

Fourth. For the support of the public schools of the city, and to purchase lots, and for the erection of school buildings thereon, thirty cents on the one hundred dollars' worth of taxable property in the city.

SEC. 2. That the taxes for the forty-sixth corporate year shall be due and payable on and after the first day of August, 1873.

81 SEC. 3. That in order to encourage the prompt payment of

city taxes for the forty-sixth corporate year, the city tax collector be, and is hereby, authorized and instructed to allow each and every taxpayer who shall, previous to the 5 December, 1873, pay the taxes due from him or her to the city of Memphis for the forty-sixth corporate year (1873) a discount at the rate of two and one-half per centum per month on the amount of such taxes so paid for the speriod of time it shall be so paid previous to the first day of January, 1874, and the amount so paid shall be taken and accepted by the city as a full payment of such taxes due by such person. The privilege hereby offered shall not be extended beyond the 4th day of December, 1873. After that date the tax collector is hereby instructed to collect the full amount of all the taxes then remaining unpaid.

82 SEC. 4. That this ordinance take effect and be in force from and after its passage.

Passed first reading by board of aldermen June 23, 1873. Passed first reading by common council June 23, 1873. Passed second and final reading by board of aldermen and common council July 2, 1873.

The above is a true and correct copy of the ordinance fixing the rate of taxation for the forty-sixth corporate year (1873), as shown by record book, vol. No. 1, in register's office.

M. T. WILLIAMSON,
City Register,
P'r A. J. McLOUDON, *Dep't*.

(Endorsed:) No. 243. United States circuit court, western district of Tennessee. J. A. Loudon vs. The City of Memphis. Ordinance levying taxes for 1873. Filed Sept. 14th, 1876. H. E. Andrews, clerk.

83 *An ordinance to fix the rate of taxation for the 47th corporate year.*

Be it ordained by the general council: That there shall levied and collected for the 47th corporate year the following amount of taxes, viz:

For general purposes, $1.00 on each $100 worth of taxable property; for interest, 25 c.; for T. E. Brown, mandamus, 30 c.; for schools, 20 c.; for Miss. River Railroad, 04 c.; for sinking fund, 01 c.; total on each $100 worth of taxable property, $1.80.

Be it further ordained that the privilege tax for the 47th corporate year shall be the same as for the 46th corporate year, except as changed by ordinance.

Passed second and final reading by aldermen June 3d, and by common council June 12th, 1874.

CITY REGISTER'S OFFICE,
Memphis, Tenn., July 28th, 1874.

84 I hereby certify that the foregoing is a true copy of the ordinance as passed by the general council of the city of Memphis fixing the rate of taxation for the 47th corporate year (1874), as the same appears of record in this office.

[L. S.] M. T. WILLIAMSON,
City Register.

(Endorsed:) No. 243. United States circuit court, western district of Tennessee. J. A. Loudon vs. The City of Memphis. Ordinance levying taxes for 1874. Filed Sept. 14, 1876. H. E. Andrews, clerk.

Articles of agreement made and concluded this 22d day of October, 1870, between the city of Memphis of the first part and J. and M. Lou-

don of the second part, whereby it is covenanted and agreed as follows, to wit: that for and in consideration of the payments hereinafter specified, the said J. and M. Loudon, contractors, hereby agree to execute in a thorough and workmanlike manner under the directions of the city engineer, as limited by the specifications hereto attached, and which are hereby made a part of this contract, the following work, to wit: Furnish all of the material and labor and in a good and substantial manner pave with stone a portion of the alley north of Jefferson street, sixteen and a half feet wide, from Second street to Fourth street and the alley north of Court street, in like manner from Second street to Fourth street. Said work shall be commenced on or before the 31st day of October, 1870, and shall be completed on or before the 1st day of January, 1871. It is understood that this contract is entered into subject to the right of the engineer or the mayor and improvement committee to make such changes from time to time during the progress of the work, either in addition thereto or deduction therefrom, as may be deemed expedient. The value of such changes to be in the same ratio as that for the work first agreed upon under this contract, and to be added to the amount to be paid under the contract, or deducted therefrom, as the case may be, and such changes shall in no case vacate or render void any of the conditions of this contract. And, furthermore, that no changes shall be made in the work, or paid for, except by a written order of the engineer. And the measurements of all work done under this contract shall be made by the city engineer, and such measurements shall be final and conclusive. And in case of any difference or dispute as to any matter growing out of this contract, or the specifications as to work or material, the same shall be referred to the city engineer, whose decision shall be final and conclusive.

It is further understood and agreed that for each and every day's delay in the performance of the work under this contract from and after the time herein before specified for its completion, the sum of ($30) thirty dollars shall be paid by the said party of the second part to the said party of the first part as compensation for the loss to be sustained by it by reason of the non-fulfilment of the contract as to time, and the said sum is hereby agreed upon as liquidated damages for said delay, and no deduction on any account shall be made therefrom; and the sum due under this provision may be reserved out of any sum due by the party of the first part to the party of the second part, or it may be recovered by an action at law from the party of the second part or their sureties. It is further understood that this contract is entered into subject to the right of the engineer or mayor and improvement committee to suspend the above work for any failure on the part of the contractors, and that such suspension shall not affect the right of the city to damages incident to such failure, and no work done under this contract shall be considered complete until it has been done to the satisfaction of the city engineer, and has been accepted by him. It is further understood and agreed that twenty per cent. of the amount to be paid by the party of the first part to the party of the second part for intersections of streets and alleys shall be retained by the party of the first part as a guaranty that the contractors will keep in good repair the entire work on the before-mentioned alleys for a period of six months from its completion. The said party of the first part to have the right to extend any part or the whole of the twenty per cent. in repairing said alleys after forty-eight hours' notice to the contractors if they should fail to make any repair which may become necessary. The party of the

first part hereby agree upon the expiration of the six months, provided that the whole of the work shall be then in good order, to pay to the party of the second part the whole or such part of the aforesaid twenty per cent. as shall not have been expended in repairing said alleys. Said payment to be made in a not' of the city due six months after date.

Specifications.

Specifications of the material and work necessary for the pavement of alleys north of Court and Jefferson streets from Second street to Fourth street.

Before laying the pavement the contractors will be required to trim the alleys to such shape as may be directed by the city engineer, but he is not to be required to cut or fill more than 12 inches in depth at
90 any place. After the road-beds are prepared, they will be covered with clean sand and gravel to a depth of not less than five inches, and no stone is to be placed upon the alleys to be paved until the full depth of sand above required shall have been spread upon them. The stone used in the pavement will be of the best quality heretofore used on pavements in the city. The joints between the stones will in no place exceed one and one-half inches. No stone shall have a less area at bottom than at top, and no pointed or wedge-shaped stone shall be used in the work. The stone shall be not less than six nor more than nine inches in depth, and not less than three nor more than six inches in thickness, and will be laid with their longest dimensions perpendicular to the lines of the alleys, but the contractors will not be required to lay them in courses. After the stones have been laid the pavement will be
91 covered with a heavy coating of gravel, which will be raked into the joints until they are filled, and the whole well rammed twice, when it will be left covered with gravel to a depth of not less than $1\frac{1}{2}$ inches. The city reserves the right to construct such culverts and drains as the city engineer may deem necessary before the work is commenced, or during the progress of the same. All surplus materials and rubbish shall be removed from the alleys as rapidly as the work progresses, and the work on any section will not be considered completed until the same has been removed. The contractors will be required to construct such barriers as may be deemed necessary for preventing accidents, and will be held responsible for all damages resulting from neglect of the same. They will be permitted to close up or obstruct more than two sections of 400 ft. each of the alleys at one time. All loss or damage
92 arising out of the nature of the work, or for any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the actions of the elements will be sustained by the contractors. The contractors will be required to furnish all of the materials, work, and necessary for completing the above work in accordance with the spirit of the specifications.

The pavement will be paid for by the square yard. The cost of the entire improvement to the middle of the alleys so improved in front of each lot abutting the alleys will be assessed upon the lot and a bill for the same, certified to by the city engineer, delivered to the contractors for collection. The alleys will be divided into sections, which will ordinarily cover the space included between two streets, and shall not in any case exceed 400 ft.

93 For and in consideration of the faithful execution of all the work as aforesaid, and the fulfillment of all the provisions of this con-

tract by the said party of the second part in the manner aforesaid, said J. and M. Loudon, their heirs, executors, administrators or assigns, shall receive in the manner hereafter stated the following prices, to wit: For the pavement on the alleys, three dollars and fifty cents per square yard; for grading the same, thirty-seven cents per square yard. Payments will be made after the completion and acceptance of the work for the intersections of streets and alleys, less twenty per cent., in notes of the city due 12 months after date, the city retaining the said twenty per cent. as herein before provided. For the remainder of the work other than the intersections of streets and alleys, the contractors will receive, when the work is completed and accepted, bills against
94 the lots or property abutting or abounding the alleys on which the work is done, for the work done in front of such lots or property, which shall be payable by the owners of said lots or property, one-half in cash and the remainder in two equal payments sixty and ninety days from the date of the bills. It is understood that the contractors shall have the right to use the name of the city in collecting the bills, either in prosecuting suits or otherwise, but the city will not be responsible for the payment of the same, nor is the city to be put to any costs or attorney's fees or expenses ot any kind in effecting the said collections.

In testimony whereof the parties to these presents have hereunto set their hands and seals the year and day first above written, and to a duplicate instrument of line tenor and date.

For the city of Memphis.

JOHN JOHNSON, *Mayor.*
J. AND M. LOUDON.

Attest:
L. R. RICHARDS,
City Register.

95 (Endorsed:) No. 243. United States circuit court, western district of Tennessee. J. A. Loudon vs. The City of Memphis. Contract of 22 October, 1870. Filed Sept. 14, 1876. H. E. Andrews, clerk. Exhibit No. 1 to J. A. Loudon's deposition. S. S. Garrett, ex.

In the circuit court of the United States for the 6th judicial circuit within and for the western district of Tennessee.

JAMES A. LOUDON, *vs.* CITY OF MEMPHIS. } Equity docket. No. 243.

Testimony taken on the part of complainant under the 67th rule of practice (as amended) for the courts of equity of the United States by S. S. Garrett, esq., special examiner, duly appointed by said court to
96 take the depositions of James A. Loudon et als. in said cause, do hereby certify that on the 10th day of August, 1876, I filed in the office of the clerk of said court an order that the taking of evidence in this cause would commence at my office in the city of Memphis on the 28th day of August, 1876, and continued from day to day until all the evidence should be taken, and a certified copy of said order was duly served by the marshal of this district upon the defendant by delivering a copy of the same to S. P. Walker, esq., city attorney, and making known the contents of the same to the mayor of said city of Memphis August 28, 1876.

Present, Wm. M. Randolph, esq., for complainant; present, S. P. Walker, esq., for defendant.

On motion of defendant's counsel and for satisfactory reasons appearing, the taking of testimony in this cause was continued to Saturday, Sept. 9th, 1876, at 10.00 m. *m.*

S. S. GARRETT,
Spec'l Examiner in Equity.

97 SATURDAY, *Sept. 9th*, 1876.

Present, Wm. M. Randolph, esq., for complainant, continued in absence of counsel for defendant, until Monday, Sept. 11, 1876.

S. S. GARRETT,
Sp'l Ex. in Equity.

MONDAY, *Sept. 11th*, 1876.

Present, Wm. M. Randolph, for complainant, continued in absence of defendant's counsel to Wednesday, Sept. 13th, 1876.

S. S. GARRETT,
Sp'l Ex. in Equity.

WEDNESDAY, *Sept. 13th*, 1876.

Present, W. M. Randolph, for complain't.

JAMES A. LOUDON, complainant, produced and sworn as a witness on the part of the complainant, deposes and says: I am plaintiff in this suit. I reside at Sevan Lake, in Arkansas County, Arkansas. I have resided there about four years. I was a member of the firm of J. and M. Loudon, the firm consisting of James A. Loudon and Milton B. Loudon, who died in the fall of the year 1873. We were contractors
98 and engaged laying stone pavements in the city of Memphis. In the year 1867 we had several contracts for paving portions of the streets and alleys of the city of Memphis. I do not remember the number of said contracts, but the same were substantially the same, differing a little in the price and the character of the work. The contracts embraced Front street from Market to Union, Center and Second alley from Market to Union, and all the cross alleys between Market and Union extending from Front to Second street. Those were contracts in 1867. The parties to these contracts were J. and M. Loudon of one part and the City of Memphis of the other part. We were to furnish the materials and lay the pavement and curb-stone and do the grading in accordance with specifications to be furnished by the city engineer. The owners of the abutting property were to pay for the work in front of their property; the cost to be apportioned among them by the
99 city engineer, and to be estimated per front foot. The city was to pay for the intersections of the streets and alleys, and also guaranteed the payment by the property owners of their respective bills. The contracts are on file in the city engineer's office, and I think, I also have copies of the same, and I refer to them for more particularity as to details. J. and M. Loudon did all the work they contracted to do, and the said work was accepted by the city's officers. At about the same time J. and M. Loudon had a contract with the city of Memphis to pave a portion of the wharf and landing with stone. J. and M. Loudon were to furnish all the materials and do the work, and the City of Memphis was to pay them according to contracts. J. and M. Loudon did the work according to said contract, and it
100 was accepted by the city's officers. As the work progressed or after it was finished the City of Memphis gave its notes for the cost of the work for which it was primarily liable under the con-

tract, including as well the streets and alleys as the wharf and landing, but gave no notes for the cost of paving for which individuals were primarily liable. Exhibit "A" to the bill is a correct list, as I believe, of the notes given J. and M. Loudon by the City of Memphis. As the work progressed, both on the wharf and landing and in the streets and alleys, J. and M. Loudon had to raise large sums of money to pay for materials and labor. J. and M. Loudon not having the money necessary to carry on the work had to borrow the money, for which they paid one per cent. and one and a half per cent., two per cent., and in two instances as high as five per cent. per month, but the general rate was about one and one-half per cent per month. We always borrowed at
101 the lowest rates we could. If we had been paid by the city according to contract we would not have been compelled to borrow money, and we did not expect to have to borrow money when we undertook to do the work. The city's officers knew that we were borrowing money to carry on the work. I had frequent conversations with the mayor, in which I urged that the city should pay at least enough to enable us to pay the interest on our notes and prevent them from going to protest. The notes given us by the city were used by us as collateral security to enable us to effect the desired loans from time to time, and the mayor and the officers of the city knew that fact. It was very difficult to get any money at all from the city. They did not pretend to pay their notes when they fell due. We carried the loans in some cases over two years before bringing suits on the notes against the city.
102 We were in hopes to get the money from the city without suit, and did not bring suit until we saw there was no chance of getting our money otherwise. In the suit against the city, by agreement of parties judgments were rendered on the 4th day of November, 1871, for the aggregate of $64,631.18, for convenience, and by agreement four judgments were rendered instead of one. This was done in order to enable J. and M. Loudon to substitute the judgments as collaterals to the parties from whom they had borrowed money. At that time we were paying one and one-half per cent. per month for the use of money. The largest judgment, $32,084.87, was rendered on notes held by P. C. Bethell, held as collateral security, and as soon as judgment was rendered J. and M. Loudon assigned the same to him to be held in place of the notes, and very soon after the other judgments were trans-
103 ferred to other parties as collateral security in place of the notes in which the judgments were rendered, the notes having been held as collateral security by such parties. The city's officers were informed and knew that J. and M. Loudon used the judgments against the city as collateral security for money borrowed. After J. and M. Loudon obtained the judgments as aforesaid, the City of Memphis denied that anything could be made by law, and the executions were returned "no property found." J. and M. Loudon were unable to get any money from the city, but were paying interest on the money borrowed by them when, about Sept., 1872, a compromise was entered into between J. and M. Loudon and the City of Memphis. I was absent at the time it was made, my brother, Milton B. Loudon acting for our firm, but I learned from my brother and the mayor the terms of said agreement or compromise. J. and M. Loudon had a large debt, in
104 addition to the notes mentioned, due them by the city on its guaranty of the unpaid paving bills of individuals. The debt due under the contracts already mentioned was over $30,000, not including interest. Some of the property-owners had paid their paving bills as charged against them; others had paid portions, and some had paid

nothing. The above amount is what remained due as principal, not including interest. In consequence of a decision of the supreme court of the State of Tennessee, made in May or June, 1872, J. and M. Loudon were unable to collect the bills remaining unpaid from the property-owners, and were forced to rely exclusively upon the city's guaranty for their payment. The city had never up to September, 1872, paid a single paving bill for which it was liable as guarantor of individual prop-
105 erty-owners, nor had it paid anything on said bills. All the work under all the contracts was completed in the years 1867, '68, and '69—most of it in 1867 and 1868. On the 22d October, 1870, J. and M. Loudon and the City of Memphis entered into a contract for paving with stone the alley next north of Court street, and the alley next north of Jefferson street from Second to Fourth street. The contract was very similar to the contracts made in 1867 for the paving of the streets and alleys with this exception, that the city expressly stipulated that it should in no event be liable for the paving done in the alleys abutting private property. The contract in other respects was not different from those of 1867. The contract is now in the city engineer's office, and I think I have a copy of the same, and for certainty and particularity I refer to it. After the supreme court had decided that the property-owner was not bound to pay for paving done under similar contracts, J. and
106 M. Loudon were in a position to lose the work they had done under the above contract, containing, as it did, the stipulation that the city was not to be liable for the work done in front of private property. All the work had been done under the contract before the decision was made. Some of the property-owners had paid their bills, others had refused, and the balance of principal due under the contract in Sept., 1872, not including interest, was $7,833.36. After the decision of the supreme court the property-owners refused to pay anything whatever, and the city claimed that under the provisions of the contract it was not liable. Under these circumstances the compromise between J. and M. Loudon and the city was entered into. Exhibit B to the bill is a resolution passed by the general council, which substantially shows the terms of said compromise. The paving bills were
107 to be taken as a debt due by the city to J. and M. Loudon, and interest to be computed on the same from the day they became due from the property-owner to the date of the compromise at 6 per cent. The amount of the debt thus due is shown by Exhibit C to the bill. For the amount of this debt J. and M. Loudon were to recover from the City of Memphis its 30-year bonds, known as the "gold bonds," at their face, and in consideration of their accepting payment in that way of the said debt the city agreed that it would set apart $\frac{3}{10}$ of the one per cent. then levied, or about to be levied, for the year 1872, for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, or so much thereof as might be necessary exclusively for the payment of the four judgments before mentioned in favor of J. and M. Loudon against the city, and that the money so set apart should be
108 paid out from time to time as collected on the judgments. The great inducement to make this compromise was to get our judgments paid promptly, and to get a settlement of the bills against the property holders without further litigation. The 30-year bonds taken from the city in payment of the debt, as above stated, were worth when J. and M. Loudon received them in the market about 50 cents on the dollar of their face value; this fact was known to both J. and M. Loudon and the city officers. The bonds are quoted at 41.45. We were very anxious to get our judgment paid, because we were owing large

sums of money, and our debt or claim against the city was being eaten up by accruing interest. These facts were known by the city's officers at the time of the compromise. J. and M. Loudon would never have accepted the bonds in payment of their debt against the city
109 but for the agreement by the city to pay their judgments as already stated. Exhibit D to the bill is a correct list of the payments made on account of the several judgments, to the best of my knowledge. On the 16th of September, 1872, the date of the compromise, it was agreed between the City of Memphis and J. and M. Loudon that the city owed them of principal and interest, on account of the paving bills remaining unpaid, $45,367.89 to pay, which sum the city delivered them 45 of its $1,000 gold bonds and $367.89 in money; all this is fully shown by Exhibit C to the bill. J. and M. Loudon made frequent demands of the city for money; all they have ever received is shown by Exhibit D to the bill. Of the 45 bonds received by J. and M. Loudon from the City of Memphis, we first used them as collateral security to get further time on loans already made, and to get
110 money to pay interest on such loans. I do not remember at what time J. and M. Loudon sold the bonds, but it was after they had dispaired of collecting the money from the city due them on the judgments. I think these bonds when sold netted us, on an average, about 50 cents on the dollar of their face value.

The further taking of this deposition was continued until Thursday, Sept. 14th, 1876, at 10 o'c. a. m.

S. S. GARRETT, *Ex.*

SEPT. 14TH, 1876, 10 a. m.

The deposition of James A. Loudon was continued as follows:

Mr. G. A. Hanson was the attorney for plaintiffs J. and M. Loudon in their suit against the City of Memphis in which the judgments heretofore mentioned were obtained. After the judgments were obtained, Mr. Hanson's fee for services was agreed upon; it was apportioned among the four several judgments pro rata, and a credit was en-
111 tered on each for the portion of the fee apportioned to it. The credits appearing in Exhibit D, under date Dec. 4, 1871, represent the fee; they were paid to Mr. Hanson or settled with him in some way by the city, but J. and M. Loudon got no money from any of those credits. The first money received by J. and M. Loudon on the judgments was $1,500 on the 14th January, 1873. In 1867 we were borrowing $5,000.00; in 1868 we were borrowing about $15,000; in 1869 about $33,000, and the same amount up to January, 1873, when the city commenced paying on the judgments, and our loans were decreased by the amount of those payments, which were generally made to the parties from whom we borrowed money. About December, 1873, one of the judgments was sold to John Overton, and in that way about $6,000.00 of borrowed money was paid, and afterward, in June, 1872, the large judgment was sold to P. C. Bethell, and in that way the balance
112 of the borrowed money, amounting to about $18,000, was paid. All the money was borrowed by J. and M. Loudon to carry on and complete their work under their contracts with the city. The paper shown me marked Ex. No. 1, and made part of this deposition, I identify as the contract between J. and M. Loudon and the City of Memphis of date Oct. 22d, 1870, and heretofore referred to in this deposition.

The further hearing of testimony was continued to September 16th, 1876.

S. S. GARRETT, *Ex.*

SEPT. 16TH, 1876.

Testimony of James A. Loudon continued:

Cross-examined by S. P. WALKER, esq., city attorney:

(The defendant, before entering upon the cross-examination of this witness, objected to all of the direct testimony above taken in so far as the witness undertakes to state the contents of written contracts or agreements between the firm of J. and M. Loudon and the defendant, the City of Memphis.)

113 Previous to the proceedings of the city council, as shown by Exhibit B to the bill, myself and brother, Milton B., had a consultation, in which we concluded to effect a compromise with the city and get payment of our judgments, if possible, without further litigation. The specific mode of accomplishing this was not at that time agreed upon between us. I was absent from the city for a time, and on my return found a settlement already effected, as shown by Ex. B. Having been absent from the city when the compromise was made, I know personally nothing except as shown by Exhibit B and from conversations with my brother and the then mayor of the city, John Johnson. Mr. Johnson said, in speaking of the compromise, that it would be beneficial to us, inasmuch as we would get our money much sooner than we otherwise would have done, and sooner than Mr. Brewer,

114 another contractor with the city, would get his pay, as he (Mr. Brewer) had gone into litigation with the city to obtain his pay. Mr. Johnson said this in answer to a suggestion made by me that the terms of the agreement were too liberal on the part of J. and M. Loudon.

Question. Did you understand this as an expression of an opinion by Mr. Johnson, or as a promise from him to pay your judgments at any fixed date?

Answer. I understood from Mr. Johnson's answer and his manner with the lights before him that it amounted to an assurance of our receiving our pay.

Question. The interview with Mr. Johnson was after the settlement was effected, was it not?

Ans. Yes. Mr. Johnson remained mayor until January, 1874.

Quest. Did you at any time other than that just previously spoken of receive any assurance from Mr. Johnson as to the prompt payment of your judgments?

115 Ans. I did not previous to the one just spoken of. Afterwards I was absent from the city, having taken up my residence in Arkansas, and being in the city only at intervals. During those intervals, when in the city, I saw Mayor Johnson, and he assured me he was paying off those judgments, and he was, too.

Quest. Is it not true that at the time of the settlement shown by Exhibit B the City of Memphis was denying the liability as guarantor upon the paving contracts between it and your firm, and that that settlement was a compromise of that question, the city agreeing to admit its liability if your firm would take payment in bonds?

Ans. I had no conversation with the city authorities in regard to their liability as guarantors, they being guarantors in the contract entered into with J. & M. Loudon, with the exception of the last contract, as already stated in my direct examination.

116 Quest. If you mean to state that at any time previous to the settlement as shown by Exhibit "B" any official of the city of Memphis promised to pay your judgments within any given date, state who the official was, the terms of the promise, and within what date the judgments were to be paid.

Ans. I had no conversation with any official, except with Mayor Johnson as before stated.

Quest. In the whole of the transactions with the city, as set forth in your bill and deposition, have you lost or made money?

Ans. If we had in hand to-day the judgment now in the United States court for about $12,000.00, we would have made a little money; I could not say how much. Without that judgment we will lose money.

And further deponent saith not.

JAMES A. LOUDON.

Subscribed and sworn to before me this 16th day of Sept., 1876.

S. S. GARRETT,
Examiner.

117 HOPKINS LOUDON, a witness for the plaintiff, being first duly sworn at the time and place aforesaid, testified:

I am a brother of the plaintiff. I was employed as an assistant by J. and M. Loudon while they were doing the paving of the wharf and landing and the streets and alleys under the contracts with the City of Memphis. The work was all done under all the contracts, and was accepted by the city. Most of the amounts due directly from the city for the work done, including as well the work done on the wharf and landing as the work done on the streets and alleys, the city gave notes for. Most, if not all, the notes were afterwards sued on by J. and M. Loudon, and judgments recovered in the circuit court of Shelby County. The bills due by individuals for paving done in front of their property, which they refused to pay, remained unpaid up to September, 1872. J.
118 and M. Loudon were unable to collect anything on the judgments after they were rendered. The city had no property subject to execution, and the officers failed or refused to make payments. J. and M. Loudon claimed that the city was liable to pay the bills due by the individuals for paving done in the streets and alleys in front of their property, but the city refused to pay any of those bills. The amounts due from individuals under all the contracts, are, I think, correctly shown by Exhibit C to the bill, J. and M. Loudon were in great distress for money. They had been borrowing large sums almost from the time they commenced work under the first of the contracts. If the city and the property owners had paid for the work done according to the contracts, it would not have been necessary for J. and M. Loudon to
119 borrow a dollar in order to carry on the work. They were forced to borrow by the failure of the city and the property owners to pay They were forced to borrow on an average not less than forty thousand dollars, and probably more. They paid on an average for the money borrowed not less than one and a half per cent. per month and from that to two per cent. per month interest. They used the city's notes in the first place as collaterals, and the assessments against property owners, and after the judgments were obtained they used the judgments. They made repeated applications to the city or its officers for money, but got nothing. The city's officers knew they were borrowing large sums of money, and were paying high rates of interest for it. These matters were subjects of daily conversation between the city's officers and J. and M. Loudon. I was present when Mayor Johnson and my brother,

120 Milton B., had the agreement of compromise or settlement; I remember no one else present except the mayor, myself, and my brother. This was in August or September, 1872, about a month or so before the resolution was passed, as shown by Exhibit B. Mayor Johnson was anxious to fund the city's debt, and wanted brother Milton to accept the city's gold bonds for what it owed him on account of the assessments against individuals for which the city was liable; my brother said that would be no advantage, as the paving bills were already pledged for money that J. and M. Loudon had borrowed, and that he would have to substitute the bonds, if he took them, in place of the paving bills. He talked over with the mayor the amounts that
121 J. and M. Loudon were borrowing and the rates of interest they were paying. Mayor Johnson finally said that if J. and M. Loudon would accept the gold bonds at par for the paving bills due by property owners, for which the city was liable, including interest, that he would cause a tax sufficient to pay the judgments J. and M. Loudon then had, to be levied that year, (1872), and set apart for the specific purpose, and would pay the judgments as the tax was collected. My brother assented to the proposition, and the matter was fully understood and agreed on between him and Mayor Johnson. Afterwards, when the general council had passed the resolutions of which Exhibit B to the bill are copies, my brother made out and swore to the account of J. and M. Loudon against the city, of which Exhibit C con-
122 tains a copy, and he and the mayor agreed upon the amount that the city owed J. and M. Loudon on account of the paving bills due by individuals, including interest. Mayor Johnson then delivered my brother the bonds and money, and he gave the receipt, all as shown by the receipt, a copy of which is contained in Exhibit C. J. and M. Loudon never would have accepted the bonds in payment of the debt due them at par except for the agreement that the tax sufficient to pay the judgments should be levied and collected and paid as above. I knew this from being present at and taking part in the negotiations between the mayor and my brother. The negotiations were going on and the matters were being discussed for two or three weeks before the plan adopted was finally agreed on. My brother's object was
123 to get money on the judgments to pay the debts of J. and M. Loudon, owed for borrowed money. That fact was talked of and well understood in the conversations between Mayor Johnson and my brother. I was personally cognizant of many of the transactions in which J. and M. Loudon borrowed money, as above stated. In November, 1871, they turned over to Col. P. C. Bethell the judgment against the city for $32,084.16 to hold as collateral, in addition to some $20,000.00 of paving bills as further security, for a loan from Col. Bethell of $25,030.00, which they had made in order to enable them to carry on and complete the city's work under the contracts. They were paying interest on this loan at the rate of one and one-half per cent. per month. They paid interest on that
124 sum till January, 1873, when the loan was reduced by payments to $17,405.61. On this sum they paid interest till July, 1874, when, finding no prospect of getting the money, and that the interest would soon completely absorb the judgment, and Col. Bethell refusing further time, they sold to him the judgment for five thousand dollars less than it then amounted to. This was the best price they could get for it. Before making the transaction I went personally to John Loague, then mayor of the city, and told him the circumstances and tried to

to get money from him. He not only refused to pay anything, but said he did not think the city ever would pay a creditor the judgment. J. and M. Loudon paid Bethell, as interest on the loan from him, as
125 nearly as I can calculate, about $9,010.80 before January, 1873, and $4,699.35 as interest after that date. A part of the interest paid before January, 1873, was probably paid to the Emmett Bank, from whom Col. Bethell took the loan. J. and M. Loudon first made the loan with the Emmett Bank, paying the bank about two per cent. per month interest for the loan. When Col. Bethell took the loan from the bank, as stated above, he paid the interest that had accrued to the bank from J. and M. Loudon, and that interest, I presume, is included in the $9,010.80 paid by J. and M. Loudon to Col. Bethell, as above.

The further taking of testimony in this cause is continued to Sept. 18, 1876.

S. S. GARRETT,
Examiner.

MONDAY, *Sept.* 18, 1876.

126 Testimony of Hopkins Loudon continued.

J. and M. Loudon had been borrowing about $6,000.00 from J. D. Brewster, guardian, for some time before November, 1871, at one and one-half per cent. interest per month. After the judgments were rendered by the circuit court of Shelby County, J. and M. Loudon, as they had previously agreed to, transferred to Mr. Brewster one of the judgments, being for $11,546.19, to be held by him as collateral security for the loan. About November, 1871, J. and M. Loudon, by a payment, reduced the loan to $5,000.00. On this sum they paid Mr. Brewster interest at the rate of one and one-half per cent. per month until December, 1873, when Mr. Brewster refused to renew further. J. and M. Loudon had then to sell the judgment in order to pay Mr. Brewster. They sold it for twelve hundred and forty-three dollars ($1,243.00) less than it called for, which was the best price they could get for it.

127 The interest J. and M. Loudon paid on the above loan from November, 1871, to December, 1873, was about $1,800.00, which, added to the loss by the sale of the judgment, amounted to $3,043.00. There were other loans to J. and M. Loudon by various parties, on which they paid interest at about the same rates. In September, 1872, the thirty-year bonds of the City of Memphis, such as J. and M. Loudon received on the compromise, were worth in the neighborhood of fifty cents on the dollar. They were so rated and sold and purchased in the market. Both J. and M. Loudon and the city's officers knew these facts. The city's bonds of a like character are now quoted at from 41 to 43 cents on the dollar. They have never been higher since J. and M. Loudon received them than they were when they did receive them. They have generally had a downward tendency since. Part of the

128 bonds taken by J. and M. Loudon were sold at 42½ cents on the dollar, another lot at 40 cents on the dollar. I do not remember the prices of the other sales, if I ever knew them. In order to make some of the collections from the city, which are credited as payments on the judgments in Exhibit D, J. and M. Loudon had to find parties who wanted to pay taxes to the city. The mayor agreed to receipt for such taxes and have the amounts credited on the judgments as payments. And J. and M. Loudon, in order to induce the tax-payers to enter into the arrangement, had to suffer or allow them discounts. The discounts allowed were about at the rate of ten per cent. on the amount to be paid.

The judgment pledged to Brewster, as mentioned above, was satisfied in this way by crediting the amount of it on the taxes of John
129 Overton. And J. and M. Loudon also paid taxes for P. C. Bethell, Thomas Boyle, and probably others, in the same way. J. and M. Loudon, I am confident, were borrowing from the time they completed the most of the work, say in 1868 or 1869, until 1874, on an average, not less than forty thousand dollars. At first they did not borrow so much, but the amounts of their loans increased continually. The rates of interest they were paying averaged about one and one-half per cent. per month. They could not borrow money cheaper, and it was very difficult to borrow even at those rates. In the conversations between Mayor Johnson and Milton B. Loudon, above spoken of, prior to the arrangement or compromise, Mayor Johnson said, and said repeatedly, that J. and M. Loudon would get the money due them on the judgments during the fall or winter of 1872, 1873, and certainly
130 by March, 1873. He also promised to have a resolution passed by the general council similar to the resolution in Exhibit B to the bill, so as to put the matter beyond doubt. After John Loague had become mayor, I tried in behalf of J. and M. Loudon to get the city to pay to them the portion of the tax for 1872 which had been set apart to pay their judgments by the resolution in Exhibit B to the bill. He refused, saying he did not consider J. and M. Loudon were entitled to a cent—that Mayor Johnson had done a good many things he had no business to do. I then tried to get a portion of the tax to be levied for 1874 set apart to pay the judgments, as had been done in 1872. But Mr. Loague refused to recommend it. In the instances in which J. and M. Loudon paid the taxes of individuals by crediting the amounts of those taxes on the judgments, it was impossible to get money on
131 the judgments, or to get payments in any other way. The mode of paying taxes as a means of getting payments on the judgments was resorted to at the suggestion and by the advice of Mayor Johnson. I made almost daily applications to the city's officers for payment of J. and M. Loudon's judgments, but without success, except as shown by Exhibit D and what I have previously stated. The paper now shown me is the contract J. and M. Loudon had to make with P. C. Bethell in order to procure the loan from him in November, 1871; I make the said contract a part of my deposition, and marke it
Ex. No. 2. Exhibit No. 2.

Similar contracts were made with the other parties from whom J. and M. Loudon obtained loans. The other paper also shown me, is a copy of an agreement J. and M. Loudon had to enter into with Col. Bethell in order to continue the loan, as therein shown. I do not
132 know where the original of the said contract is, but suppose Col. Bethell has it. I mark the said paper Exhibit No. 3 to my
Ex. No. 3. deposition, and make it a part of it.

The further taking of testimony is adjourned until to-morrow, Sept. 19th, 1876, at 11 a. m.

S. S. GARRETT,
Examiner.

TUESDAY, *Sept. 19th*, 1876.

Cross-examination by counsel for defendant, the City of Memphis.

Quest. 1. In your direct examination you say: "Mayor Johnson finally said that if J. and M. Loudon would accept the gold bonds at par for the paving bills due by property owners, for which the city was liable, including interest, that he would cause a tax sufficient to pay the judg-

ments J. and M. Loudon then had, to be levied that year (1872) and set apart for the specific purpose, and would pay the judgments as the tax was collected." Were the proceedings of the council as shown by Exhibit B to the bill passed in conformity to the agreement and
133 understanding with Mayor Johnson, and was the settlement accepted by J. and M. Loudon as in conformity to the previous understanding and agreement?

Ans. It was. The agreement was made with Mayor Johnson about two weeks before the proceedings shown by Exhibit B, and J. and M. Loudon had nothing more to do with the matter until after those proceedings were had, when Mayor Johnson notified them that he was ready to issue the bonds and they (J. and M. Loudon) went forward and accepted them.

Quest. 2. Did J. and M. Loudon know at the time they accepted the bonds of the passage of the resolution appropriating $\frac{3}{10}$ of the general tax of 1872 to payment of their judgment, and was that appropriation in their opinion and in the opinion of Mayor Johnson sufficient to pay their judgment? Was it accepted by J. and M. Loudon as in full compliance with the previous understanding?

134 Ans. They knew that the resolution had been passed, and were informed by the mayor that the appropriation was entirely sufficient to discharge the judgments. During that fall, Mayor Johnson assuring them that it was sufficient, they rested upon what he said about it.

Quest. 3. Did you understand Mayor Johnson to make a promise that the judgments should be paid, or only to express an opinion that the appropriation of $\frac{3}{10}$ of the taxes of 1872 would be sufficient to pay them when collected?

Ans. I understood him to make a promise that the judgments should be paid during that fall, or by the 1st of March following at furthest.

Quest. 4. Was the promise made before or after the proceedings shown by Exhibit B?

Ans. Both before and after.

Quest. 5. You say that "the city officers" knew that J. and M. Loudon were borrowing large sums of money and paying high rates of
135 interest for it. Specify what officers knew these facts.

Ans. Mayor Leftwich, McDavitt (mayor pro tem.), Mayor Johnson, Mayor Loague, Comptroller Newsom; Martin Kelly, city treasurer under Loague; W. H. Bridges, city treasurer under Mayor Johnson and for a long time previous; L. R. Richards, city register; R. D. Baugh, city comptroller under Leftwich; D. A. Shepherd, comptroller under Johnson; F. C. Schaper, comptroller under Johnson's second term; J. H. Bowen, city tax collector.

Quest. 6. Except the persons you have named as mayor, had any of those you have named any control of the question whether the judgments of J. and M. Loudon should be paid as promised by Mayor Johnson?

Ans. I do not know whether they had or not; we looked to Mayor Johnson—relied on what he had told us—and left the matter with him; I do not know that any of the officers whom I have named had
136 any control of the question except the mayor.

Quest. 7. Have you any pecuniary interest in this suit?

Ans. None whatever; and none in the judgments still controlled by J. and M. Loudon against the city.

Re-examination by plaintiff:

J. and M. Loudon had nothing to do with preparing or wording the resolution of which Exhibit B to the bill is a copy.

And further deponent saith not.

H. LOUDON.

Subscribed and sworn to before me this 20th day of September, 1876.

S. S. GARRETT,
Examiner.

I, S. S. Garrett, examiner duly appointed by the circuit court of the United States for the western district of Tennessee in the sixth judicial circuit, do hereby certify that on the several days named in the depositions hereto annexed I was attended at my office at the United States court rooms in the City of Memphis, Tennessee, by counsel and
137 the witnesses aforesaid; that the said witnesses were duly sworn and examined, and the depositions were reduced to writing and read to the witnesses, and by them subscribed in my presence, and that Exhibits Nos. 1, 2, and 3 were introduced in evidence in said cause during the taking of said depositions.

[L. S.] S. S. GARRETT,
Examiner.

Dated Sept. 20th, 1876.

Depositions, 85 folios, @ 20, 17; eight per diems, @ 3.00, 24; paid by plaintiff.

S. S. GARRET, *Ex.*

(Endorsed:) No. 243. United States circuit court, western district of Tennessee. James A. Loudon vs. The City of Memphis. Depositions of J. A. Loudon and H. Loudon for complainant. Filed Nov. 13th, 1876. H. E. Andrews, clerk. L. H. Pillsbury, D. C. Fee, $41.00. Paid by complainant, J. A. Loudon.

138 MEMPHIS, TENN., *Nov.* 4th, 1871.

J. AND M. LOUDON
vs.
CITY OF MEMPHIS.

Judgment roll in the office of the clerk of the first circuit court of Shelby Co., case 1450.

We, the undersigned, for a valuable consideration do assign and transfer to P. C. Bethell a judgment in the above case for 32,084.87, paid with full right to sell or dispose of the same at private sale or otherwise, or to collect the same in our name, and we do hereby guarantee the full collection of said judgment. The said judgment, subject to sale only at the maturity of our note to him for 25,030.76 at his discretion, without advertising or giving notice of the same; and if the proceeds of said sale shall not cover the principal, interest, and expenses, we hold ourselves bound to pay the balance.

J. AND M. LOUDON.

Witness:
J. H. ACKLIN.

139 (Endorsed:) J. and M. Loudon. Assignment of judgment to P. C. Bethell, and consideration. Exhibit No. 2 to H. Loudon's deposition.

S. S. GARRETT, *Ex.*

MEMPHIS, TENN., *Nov.* 13, 1872.

Know all men by these presents, for and in consideration of P. C. Bethell withholding from sale a judgment he holds against the City of Memphis on account of a note he holds against us, and on account of interest due him on same for three months, from January 3d to April 3d, 1873, we obligate and bind ourselves to pay to said Bethell nine hundred and thirteen and $\frac{79}{100}$ ($913.79) on or before the 3d day of April, 1873. In case we do not meet our note due P. C. Bethell by January 3d, 1873, we obligate and bind ourselves to the above contract.

J. AND M. LOUDON.

140 Messrs. ACKLIN and SNEED:

You will take notice I do not obligate myself to extend the time, and it was agreed in the presence of Sneed that the matter was to stand as it does, being optionary with me whether I will extend the time or not to J. and M. Loudon after the 3d January, 1873. J. and M. Loudon only propose to extend the time if they cannot pay at maturity and to pay me a certain sum to do so. I must be governed by circumstances when the note falls due January 3d, 1873, but if I do extend the time, they must pay the $913.79 in advance, cash.

P. C. BETHELL.

(Endorsed:) J. A. Loudon vs. City of Memphis. Copy of proposition by P. C. Bethell to extend loan. Exhibit No. 3 to H. Loudon's deposition. S. S. Garrett, ex.

141 THE STATE OF TENNESSEE:

Pleas before the supreme court of the State of Tennessee, at a special term for the western division of the State, at Jackson, on the first Monday in June, A. D. 1875, said special term held in pursuance of an "act of the general assembly" passed February 16th, 1875.

Present, Hon. A. O. P. Nicholson, chief justice, and James W. Deaderick, Thomas J. Freeman, and John L. T. Sneed, judges.

Be it remembered that heretofore, to wit, on the 10th day of April, A. D. 1874, the following transcript of a record was filed in the office of the clerk of the supreme court of said State at Jackson, to wit:

THE STATE OF TENNESSEE EX REL. JAMES Loudon and Hopkins Loudon. *vs.* JOHN LOAGUE AND OTHERS.	2004. Ended D. 295 Shelby Law D.

142 Pleas at a term of the first circuit court, began and held for the county of Shelby, State of Tennessee, at the court-house, northeast corner of Union and second streets, in the city of Memphis, on the third Monday, being the 19th day of January, A. D. 1874, the honorable C. W. Heiskell, judge of the first circuit court of Shelby County, present and presiding; B. F. Coleman, clerk of said court, and W. J. P. Doyle, sheriff of Shelby County, also present.

And at, to wit, on the 20th day of March, 1874, being one of the days of the January term, 1874, the following proceedings were had, to wit:

Petition.

In the first circuit court.

To the honorable C. W. Heiskell, judge:

James A. Loudon and Hopkins Louden, surviving partners of the late firm of J. and M. Louden, composed of them and M. B. Lou-
143 den, since deceased, respectively state and show:

That on the 4th day of November, 1871, by the judgment of this court, the said firm of J. and M. Louden recovered of the City of Memphis the sum of $32,084.87 and $31.75, the costs of the suit for which execution was awarded.

The said judgment remains in full force and unsatisfied except as follows:

$930.46, paid December 4th, 1871.
$4,000.00, " 1st April, 1873.
$1,000.00, " 7th April, 1873.
$3,000.00, " 5th August, 1873.
$913.43, " 31st December, 1873; and
$335.00, " 7th January, 1874.

On the same day the said firm, by the like judgment, recovered of the said city the further sum of $11,546.31, for which execution was awarded.

The said judgment remains in full force and unsatisfied except as follows:

144 $334.84, paid December 4th, 1871.
$10,000.00, " December 24th, 1873; and
$211.47, " 31st December, 1873.

On the same day by the like consideration and judgment the said firm recovered of the said city the further sum of $11,000.00 for which execution was awarded.

The said judgment remains in full force and unsatisfied except as follows:

$319.00 paid on the 4th Dec., 1871.
$919.00 paid on the 1st Feb'y, 1873.
$1,000.00 paid 6th June, 1873.
$1,000.00 paid 3d July, 1873.
$1,000.00 paid 4th August, 1873.
$1,000.00 paid 4th September, 1873, and
$2,523.40 paid 31st December, 1873.

On the same day by the like judgment, the said firm recovered of the city the further sum of $10,000.00 for which execution was awarded.

The said judgment remains in full force and unsatisfied, except as follows:

145 $290.70 paid December 4th, 1871.
$1,500.00 paid January 14th, 1873.
$1,000.00 paid June 6th, 1873.
$1,500.00 paid August 9th, 1873.
$1,704.00 paid 4th, 1873, and
$209.13 paid 31st December, 1873.

The City of Memphis has no property subject to execution at law out of which the said judgments or any or either of them or any part thereof can be made by process of law.

And writs of execution have heretofore issued on each of the said judgments and have been delivered to the sheriff of Shelby County,

and the same have severally been returned by him with the return thereon endorsed that there is no property whereon to levy for the satisfaction of the same.

Petitioners here refer to the said judgments, executions, and returns, remaining of record in this court as part of this their petition.

146 By reason of the facts aforesaid, petitioners have no remedy by the ordinary course of the law, to compel the payment of the said four judgments.

The city has altogether failed and neglected for more than two years to make payment and its officers when applied to for payment have repeatedly declared that they have no means with which to pay, and that they can give petitioners no assurance that at any time in the future they will be in a better condition for making payment of the said judgments than they are at present.

The City of Memphis has no special power to levy tax for the payment of judgments recovered against it. But it has power to "levy and collect taxes for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, but the tax imposed for that purpose shall never exceed one per centum, or one dollar

147 on every hundred dollars' worth of property, within the city limits liable to taxation and valued at cash prices.

Petitioners are advised that the payment of judgments recovered against the city is one of the expenses necessar'y incurred in administering the affairs of the city and that a portion of the tax levied and collected under the above power ought to be devoted to that purpose as a matter of course; and if any discrimination is made amongst the debts of the city to be paid out of the taxes levied and collected under said power, petitioners are advised and submit that judgments in the order of their rendition ought to be prefer'ed to all other debts.

Petitioners state and show that it would be comparatively easy for the city to pay off the said judgments, within a comparatively reasonable time, if the officers having control of its finances would set

148 apart a reasonable proportion of the taxes collected to defray the expenses necessarily incur'ed in administering the affairs of the city for that specific purpose.

But petitioners have requested the mayor to cause that to be done and he has positively refused to do so.

Petitioners fu'ther state and show that a tax of one per cent. or one dollar on each one hundred dollars of taxable property was levied and is being collected to defray the expenses necessarily incurred in administering the affairs of the city for the 46th corporate year 1873, a large part of the said tax assessed having already been paid into the city treasury.

When the levy of taxes for the 46th corporate year 1873 was before the finance committee of the general counsel, and afterwards when it was before each board for action, it was proposed to reduce the

149 rate to be levied for defraying the necessary expenses of the city from one dollar on the hundred dollars' worth of taxable property to seventy cents, as that rate would be adequate to pay the expenses directly incur'ed in car'ying on the operations of the government of the city, but it was replied that there was judgments against the city remaining unpaid and which ought to be paid, and that in order to enable the city to pay them the said rate should be one dollar instead of seventy cents; and acting upon this view the general council fixed the rate at one dollar instead of seventy cents, intending that

thirty cents of the said dollar should be devoted to paying judgments against the city in the order in which they were rendered.

The judgments aforesaid in favor of petitioners were among those intended by the general council to be paid out of the said tax, and
150 are the first in the order of payment as petitioners are informed and believe and charge.

The general council for the 44th corporate year, 1871, when it was not intended to provide for the payment of judgments against the city, fixed the rate of taxation for the purpose of defraying the city's necessary expenses at seventy cents on the hundred dollars' worth of taxable property.

But for the 45th corporate year, 1872, when the judgments now held by petitioners and other judgments were to be provided for, it fixed the rate of taxation for the said purpose at one dollar on the one hundred dollars' worth of taxable property, and subsequently passed a resolution that three-tenths of the amount that might be collected upon the said tax, or so much thereof as might be necessary for the purpose, be appropriated and set apart for the payment of judgments against
151 the city, and should be paid on the said judgments according to priority in date from time to time as collected.

A copy of the said resolution is filed with and as a part of this petition, and is marked Exhibit A.

Petitioners are informed and believe and charge that it was merely an oversight that a similar resolution was not passed in reference to the three-tenths of the said tax so levied for defraying the expenses necessarily incurred in administering the affairs of the city for the 46th corporate year, 1873.

Petitioners further state and show that they have no means of collecting the said judgments except by having a specific part of the said tax so levied to defray the expenses necessarily incurred in administering the affairs of the city appropriated for the purpose, because,
152 as they are informed and believe and charge the city has no general power of taxation and can levy only taxes expressly authorized by law, and no part of any other tax that is authorized by law to levy and collect can lawfully be applied to the payment of the said judgments, and besides petitioners must be paid out of the tax already levied as no higher rate than one dollar on the hundred dollars of taxable property can be levied to defray the expenses necessarily incur'ed, and the tax already levied is at that rate as already shown.

Petitioners are informed and believe and charge that seventy cents of the said tax is, if promptly collected, amply sufficient to pay the necessary current expenses of administering the city government, and that thirty cents thereof can, without detriment to the public interest, be set aside an' appropriated to pay their judgments and other
153 judgments in their order; and besides that there are large sums due the city for taxes assessed and remaining unpaid for past years, and such taxes are being collected and are at the disposal of the city government for ligitimate purposes.

Petitioners are advised that the resolution made Exhibit A, to this petition was a specific appropriation of three-tenths of the amount to be collected on the tax assessed for the year of 1872 for the purpose of defraying the necessary expenses of the city to the payment of the judgments of petitioners, and that the said proportion cannot be diverted from the said purpose but must be applied as fast as collected to the payment of the said judgments, but, as petitioners are informed and

believe and charge, the present officers of the city refuse to recognize any claim on the part of petitioners to the said three-tenths of
154 the amount collected on the said tax, and refuse to pay over the same and appropriate it, in entire disregard of the rights of petitioners in the premises.

Petitioners are also informed and believe and charge that in consequence of the facts hereinbefore stated thirty cents of the said dollar on the hundred dollars of property so levied for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city for the 46th corporate year, 1873, are appropriated and set apart for the payment of the said judgments and cannot lawfully be diverted from the said purpose, though, as already stated, the city by its officers refused to recognize the fact, and refuses to pay any part of the said tax so collected to the payment of the said judgments but appropriates the same to other and different purposes.

155 The judgments aforesaid were rendered for work done by the said firm of J. and M. Louden in paving the streets and wharf of the city, and their debt was incurred for a legitimate corporate purpose, and, if necessary, petitioners are advised that they are entitled to have the entire revenue of the city raised for the purpose of defraying its necessary expenses, appropriated to the payment of their said judgments in preferance to and to the exclusion of all other debts and claims not in judgment.

Wherefore petitioners pray that John Loague as mayor, James A. Newsom as comptroller, Martin Kelly as treasurer, and H. G. Lee, Owen Dwyer, S. B. Robbins, Andrew Davis, Nicholas Malatesta, Henry G. Dent, M. F. Ball, J. T. Hillsman, Michael J. Doyle, and Patrick Calligan, members of the board of aldermen, and William Hewitt, P J. Kelly, John Walsh, W. J. Chase, Charles A. Beehn, A. G.
156 Tuther, E. Keed, J. A. Roush, Joseph Clouston, jr., Thomas, William M. Harvey, Isaac Happek, James S. Carpenter, Turner Hunt, Barrett E. Barinds, J. B. Hughes, Walters , George E. Page, Moone, and Gus. A. Morti, members of the common council, and the said two bodies together constituting the general council of the city of Mememphis, be by an alternative writ of mandamus commanded to pay petitioners forthwith the sum due them on the said four (4) judgments, or in default thereof that they specifically set apart and appropriate thirty cents on each dollar of the tax levied for the 45th and 46th corporate years, 1872 and 1873, or so much thereof as may be necessary, or some other specific part of the revenue, sufficient in amount for the sole and exclusive purpose of paying the said four (4) judgments of your petitioners, and that they pay over to your petitioners
157 from time to time, as the same may be collected, the said thirty cents of the said tax until the said judgments shall be fully satisfied, or appear in court here on a day to be fixed by the judge and show cause to the contrary, and that on the final hearing the said mandamus may be made peremptory and obedience thereto enforced.

And, as in duty, &c.,

RANDOLPH, HAMMON AND JORDAN,
For Petitioners.

Hopkins Louden, one of the petitioners, makes oath in due form of law that the statements of the foregoing petition are true to the best of his knowledge, information, and belief.

H. LOUDEN.

Subscribed and sworn this 23d day of Feb'y, 1874.

B. F. COLEMAN, *Clk.*

158 *Exhibit A to the petition of J. and M. Louden.*

Whereas J. and M. Louden proposes to accept the thirty-year gold-bearing bonds of the city at par, in payment of the sums remaining due them for paving with stone certain streets and alleys of the city; and whereas the judgments against the city in favor of the said J. and M. Louden on notes given for paving portions of the wharf, now amounting to something over seventy thousand dollars, were estimated to be provided for by the taxes to be collected for the present year: Therefore,

Resolved by the general council of the City of Memphis, That the mayor be, and is hereby, authorized to deliver to the said J. and M. Louden a sufficiency of the said bonds at par to pay the said indebtedness for paving the streets and alleys.

159 Resolved further, That three-tenths of the amount that may be collected upon the tax levied for the present year for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, or so much thereof as may be necessary for the purpose, be, and the same is hereby, appropriated and set apart for the payment of the said judgment, and shall be paid on said judgment according to priority in date from time to time as collected.

Adopted by board of aldermen, August 8, 1872. Referred to finance, ways and means committee by common council August 9th, 1872.

Report of finance and ways and means committee.

Upon the proposal of J. and M. Louden to accept the thirty-year gold-bearing interest bonds of the city at par in payment of their
160 claims against the city for stone paving, &c., and the accompanying resolution, adopted by the board of aldermen August 8th, 1872, but referred by the council to their finance, ways and means committee Aug't 9th, 1872, your council finance, ways and means committee report favorably.

(Signed) JAMES F. SCHABELL,
Chairman Common Council Committee.

Report read, received, and adopted by council Sept. 4th, 1872.

The above is a true and correct copy of resolution setting apart a portion of the tax for the purpose of paying judgments in favor of J. and M. Louden, as shown by record book, vol. 1st, register's office.

M. F. WILLIAMSON,
City Register,
Per A. J. McLENDON,
Dep. R.

161 (Endorsed:) Filed Feb'y 25th, 1874. B. F. Coleman, clerk by L. E. Boswell, D. C.

Cost bond.

STATE OF TENNESSEE, J. A. AND H. LOUDON
vs.
JOHN LOAGUE, MAYOR, AND OTHERS. } 660 Ref. docket.

I bind myself to the above named defendants in the sum of five hundred dollars for the successful prosecution of the above action, to be void on condition that I pay all the costs which may at any time be adjudged

against the plaintiffs in the event that they shall not pay the same; otherwise to remain in full force.

Witness my hand this 26th day February, 1874.

C. CURTIS. [SEAL.]

Affidavit.

162 Hopkins Loudon makes oath that he has just discovered a mistake in his petition for mandamus, filed in the first circuit court of Shelby County, Tennessee, on the 28th of February, 1874, against John Loague and others, which he desires to correct.

He is there described as a surviving partner ot the firm of J. and M. Loudon, when in fact he never was such partner and never belonged to said firm.

H. LOUDON.

Feb'y 28th, 1874.

Sworn and subscribed before me Feb'y 28th, 1874.

B. F. COLEMAN, *Clk.*

(Endorsed :) Filed Feb'y 28th, 1874. B. F. Coleman, clerk.

Order for mandamus.

On, to wit, the 25 day of Feb'y 1874, the following appears of record, to wit:

163 STATE OF TENNESSEE ON THE RELATION OF James A. Louden and Hopkins Louden *vs.* JOHN LOAGUE AND OTHERS.

This day came James A. Louden and Hopkins Louden, and file their petition for mandamus, and on their said relation it is ordered that upon the said relators executing a bond in the sum of $500.00 conditioned to pay costs as required by law the alternative writ of mandamus issue in accordance with the prayer of said petition, returnable to this court on Monday, March 9, 1874.

Alternative mandamus.

State of Tennessee to John Loague, mayor of the City of Memphis, James A. Newsom, comptroller, Martin Kelly, treasurer, and
164 H. S. Lee, Owen Dwyer, S. B. Robbins, Andrew Davis, Nicholas Malatesta, Henry G. Dent, M. F. Ball, J. T. Hillsman, Michael J. Doyle and Patrick Calligan, members of the board of aldermen, and William Hewitt, P. J. Kelly, John Walsh, W. J. Chase, Charles A. Beehn, A. J. Tuther, E. Keck, J. A. Roush, Joseph Clouston, jr., Thomas, Wm. M. Harvey, Isaac Happeck, Jas. S. Carpenter, Turner Hunt, Barrett E. Barinds, J. P. Hughes, Moon, Watters, George E. Page, and Gus A. Morti, members of the common council, the said two bodies together constituting the general council of the City of Memphis, greeting :

Whereas it appears from the petition of James A. Loudon and Hopkins Louden, surviving partners of the late firm of J. and M. Louden, composed of them and M. B. Loudon, since deceased, herein filed,

165 that the said firm of J. and M. Louden on the 4th day of November, 1871, recovered a judgment in the first circuit court of Shelby County against the City of Memphis for the sum of $32,084.87 and $31.75 costs of suit, for which execution was awarded, and that the said judgment remains in full force and unsatisfied except as follows:

$930.46 paid Dec. 4th, 1871.
$4,000.00 paid the 1st day of April, 1873.
$1,000.00 paid 7th day of April, 1873.
$3,000.00 paid 5th of Aug'st, 1873, and
$335.00 paid January 7th, 1874.

And on the same day the said firm, by the like judgment, recovered of the said city the further sum of $11,546.31 for which execution was awarded, which remains in full force and unsatisfied except as follows:

$334.84 paid Dec. 4th, 1871.
$10,000.00 paid Dec. 24th 1873.
$1,211.47 paid 31st Dec., 1873.

166 And on the same day, to wit, the 4th day of November, 1871, by the like consideration and judgment, the said firm recovered of the said city the further sum of $11,000.00 on which execution was awarded and the same remains in full force and unsatisfied except as follows:

$319.00 paid on the 4th December, 1871.
$919.00 paid on the 1st of February 1873.
$1,000.00 paid 6th June, 1873.
$1,000.00 paid 3d July, 1873.
$1,000.00 paid 4th August, 1873.
$1,000.00 paid 4th Sept., 1873, and
$2,523.46 paid 31st Dec., 1873.

And on the same day, to wit, the 4th day of November, 1871, by the like judgment the said firm recovered of the said city the further sum of $10,000.00 for which execution was awarded and which also remains in full force and unsatisfied, except as follows:

$270.70 paid Dec., 4th, 1871.
$1,500.00 paid Jan'y. 4th, 1873.
$1,000.00 paid June 6th, 1873.
$1,500.00 paid Aug'st 9th, 1873.
$1,764.00 paid 14th * * * * * * * 1873, and

167 $209.13 paid 31st Dec., 1873.

And it further appears that the City of Memphis has no property subject to execution at law out of which the said judgments or any or either of them or any part thereof can be made by process at law, and that writs of execution have heretofore issued on each of the said judgments and have been delivered to the sheriff of Shelby County, and the same have been severally returned by him with the return thereon endorsed that there is no property whereon to levy for the satisfaction of the same, and by reason of the facts aforesaid the petitioners have no remedy by the ordinary course of law to compel the payment of the said four judgments, and that the city has failed and neglected for more than two years to make payment, and its officers when applied to for payment have repeatedly declared that they have no means with

168 which to satisfy the same.

And whereas the said petitioners have obtained from the honorable C. W. Heiskell, judge of the first circuit court of Shelby County, an order that an alternative writ of mandamus be issued to compel you the said John Loague, mayor; J. A. Newsom, comptroller; Martin

Kelly, treasurer; and H. S. Lee and others, members of the board of aldermen, and Wm. Hewitt and others, members of the common council, the said bodies constituting the general council of the city of Memphis, to pay the petitioners the said sums due them on the said judgments, or set apart certain moneys for the payment of the same, &c.

You are therefore notified and required to pay petitioners forthwith the sums due them on the said four judgments, or in default
169 thereof, you will specifically set apart and appropriate thirty cents on each dollar of the tax levied for the 45th and 46th corporate years, 1872 and 1873, or so much thereof as may be necessary, or some other specific part of the revenue sufficient in amount for the sole and exclusive purpose of paying the said four judgments of said petitioners, and pay over from time to time to the petitioners, as the same may be collected, the said thirty cents of the said tax until the said judgments shall be fully satisfied, or appear before the judge of the first circuit court of Shelby County, at the court-house of said court, on Monday, March 9th, 1874, and show cause, if any you have, why you do not do so.

Herein fail not, and have you then and there this writ and a return of the manner in which you have executed the same.

Witness B. F. Coleman, clerk of said court, at office in the city
170 of Memphis, the 26th day of Feb'y, 1874.

B. F. COLEMAN, *Clerk.*

(Endorsed:) Issued 26th day of Feb'y, 1874. B. F. Coleman, clerk.

Demurrer.

1st circuit court.

J. A. AND H. LOUDEN
vs.
JOHN LOAGUE, MAYOR, ET AL. } Demurrer.

Defendants demur to so much of the petition filed herein as they failed by answer herewith filed to controvert, and for special cause of demurrer they assign:

1st. It appearing from the petition that defendants have no power to levy a special tax for the payment of their judgments and that the maximum per centum has already been levied for defraying the general expenses necessarily incurred in administering the affairs of the
171 city there is no other or different duty in the premises of a minister'al character that they can be required to perform.

Second. The ordinances or resolutions referred to as Exhibit A extended to and included no other tax than that for the year 1872, petitioners' pro rata portion of which, that they have in hand or may collect, they are willing to pay.

Third. The motive or understanding under which a rate per cent of taxation is assessed by defendants, and which is not stated in the ordinance levying the same, cannot be enquired into in this proceeding.

Fourth. The specific appropriation of the tax, levied to defray the necessary expenses of administering the affairs of the city, is confided by law to defendants, whose discresion cannot be controlled by a law court under mandamus.

Fifth. The judgments in this court are entitled to no legal pri-
172 ority over other indebtedness of the city for payment out of the

general fund assessed for necessary expenses of the city, and all are within the discresion of defendants.

Sixth. It is not alleged that defendants have in hand any portion of the fund provided in 1872 for petitioners, or that defendants have misappropriated or contemplate the misappropriation of any portjon of that or of any tax levied for general purposes, and therefore no ground is shown for any extraordinary relief.

G. A. HANSON,
City Attorney.

(Endorsed:) Filed March 6, 1874. B. F. Coleman, clerk.

Answer.

STATE OF TENNESSEE, EX. REL. JAMES AND H. LOUDEN,
vs.
JOHN LOAGUE ET ALS.

173 The defendants for answere to so much of relators' petition as is not demurred to, say that it is not true, as alledged, that defendants refuse to pay to relators their pro rata of the three-tenths of the one per cent. of the tax levied and collected for the year 1872; on the contrary, defendants aver that they are and have been since their induction into office ready and willing to pay to relators their pro rata proportion of the said three-tenths of one per cent. to which they are entitled by the resolution of the general council referred to in relators' petition, as fast as the same is collected. Defendants cannot answere as to the acts of their predecessors, but the records of the city show that more than their proportional part of said tax was paid to relators in the sums and at the dates of payment set out in the petition; there was none of said tax in the treasury when defend-
174 ants came into office, and their collections of said tax of 1872 up to the filing of relators' petition would only entitle them to about $40.

This sum defendants are ready to pay, have always been ready and willing to pay, and never have refused to pay, and any allegations to the contrary is untrue.

Wherefore defendants pray that they be hence dismissed with their proper costs.

G. A. HANSON,
City Attorney.

(Endorsed:) Filed March 17, 1874. B. F. Coleman, clerk, by L. E. Boswell, D. C.

Judgment.

On, to wit, the 20th day of March, 1874, the following appears of record, to wit:

STATE OF TENNESSEE, RELATION OF JAMES A. Loudon and Hopkins Loudon,
vs.
JOHN LOAGUE, MAYOR OF THE CITY OF MEMphis, and others.

175 This cause came on to be heard before the honorable C. W. Heiskell, judge presiding, upon the demurrer of the defendants to

plaintiffs' petition and alternative writ of mandamus, which, being heard and understood by the court, the said demurrer is sustained.

It is therefore ordered by the court that the said alternative writ of mandamus be discharged, that said petition be dismissed, and that the defendant recover of the plaintiff and C. Curtis, surety, the costs in this behalf expended. And thereupon the plaintiff prays an appeal in the nature of a writ of error to the next term of the supreme court, to be holden at Jackson, on the 1st Monday in April, 1874, from the said judgment. And having given bond in the sum of five hundred dollars, conditioned as provided by law, with H. McKienariy as security, the said appeal is granted and this entry, not being made on the 20th instant, is made now as for then.

176 *Appeal bond.*

Know all men by these presents that we, J. and M. Loudon as principals, and M. H. McKienary, are held and firmly bound unto the City of Memphis, its heirs, executors, administrators and assigns, in the penal sum of five hundred dollars and cents, for the payment of which, well and truly to be done, we bind ourselves and each of us, our heirs, executors, administrators and assigns, both jointly and severally, firmly by these presents, sealed with our seals and dated this 24th day of March, A. D. 1874.

But the condition of the above obligation is such that whereas the above bounden J. and M. Loudon have this day prayed and obtained an appeal in the nature of a writ of error to the next supreme court to be held for the western division of the State of Tennessee, at Jackson, on the first Monday in April next, from a judgment which the said
177 City of Memphis has obtained against them in the first circuit court of Shelby County, at the January term, and on the 24th day of March, 1874, for the dismissal of their petition for a mandamus and costs of suit, now if the said appellants prosecute their said appeal with effect, or in case they fail therein do pay and satisfy, abide by and perform the judgment order or decree of the said supreme court to be had therein, and all such costs as may be awarded against them for wrongfully prosecuting said appeal, and in any event shall pay all costs which may at any time be adjudged against them in said cause, then this obligation to be void; otherwise toremain in full force and effect.

J. AND M. LOUDON. [SEAL.]
M. H. MCKIENARY. [SEAL.]

Surety owns real estate on Old Raleigh Road at Junction Auction, unencumbered and subject to execution.

(Endorsed:) Filed 24th day of March, 1874. B. F. Coleman, clerk.

178 *Judgment of supreme court.*

And at, to wit, on Tuesday, June 8th, 1875, one of the days of the said special June term, 1875, of said supreme court, the following judgment:

THE STATE OF TENNESSEE, EX REL. JAMES A. Louden and Hopkins Louden, *vs.* JOHN LOAGUE ET ALS. } No. 295, Shelby law docket.

The parties appear by their attorneys, and thereupon the record proceedings and judgment of the court below in this cause being seen and

fully understood by the commission, and it appearing that in the same there is no error, it is therefore considered that the judgment aforesaid be in all things affirmed, and the alternative writ of mandamus discharged and the petition dismissed, and that the defendants in error recover of the plaintiffs in error and C. Curtis, their surety on cost
179 bond, and M. H. McKienary, their surety on appeal bond, the costs of this cause in this court and the court below, for which let execution issue.

THE STATE OF TENNESSEE:

I, John H. Freeman, clerk of the supreme court for the western division of said State, at Jackson, do hereby certify that the above and foregoing is a true and perfect transcript of the record and proceedings had in a certain cause lately determined by said court wherein the State of Tennessee, ex. rel. James and Hopkins Loudon, was plaintiff in error, and John Loague et. al. defendants, as the same fully appears of record in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at office, in the city of Jackson, this 4th day of December, A. D. 1876, and 101st year of American Independence.

[SEAL.] JOHN H. FREEMAN, *Clk*,
By S. D. HAYS, *D. C.*

180 (Endorsed:) Eq. 243. The State of Tennessee, ex rel. James Loudon and Hopkins Loudon, vs. John Loague and others. Transcript. No. 243. Circuit court of the United States, western district of Tennessee. James A. Loudon vs. The City of Memphis. Filed Dec. 8th, 1876. H. E. Andrews, clerk, by L. H. Pillsbury, D. C.

181 THE STATE OF TENNESSEE:

Pleas before the supreme court of the State of Tennessee, at a special term for the western division of the State, at Jackson, on the first Monday in June, A. D. 1875, said special term held in pursuance of an "act of the general assembly," passed February 16th, 1875.

Present, Hon. A. O. P. Nicholson, chief justice, and James W. Deaderick, Thomas J. Freeman, and John L. Sneed, judges.

Be it remembered that heretofore, to wit, on the 20th May, A. D. 1875, the following transcript of a record from the 1st circuit court of Shelby County, Tennessee, was filed in the office of the clerk of the supreme court of said State, at Jackson, to wit:

P. C. BETHEL
vs.
CITY OF MEMPHIS. } ✕ 361, Shelby law. No. 2011. Ended. D.

Pleas at a term of the first circuit court, begun and held for the
182 county of Shelby, State of Tennessee, at the court-house northwest corner of Main and Poplar streets, in the City of Memphis, on the third Monday, being the 18th day of January, A. D. 1875.

The honorable C. W. Heiskell, judge of the said first circuit court of Shelby County, present and presiding; B. F. Coleman, clerk of said court, and C. L. Anderson, sheriff of Shelby County, also present.

State of Tennessee to the City of Memphis and John Loague, mayor of the city of Memphis, and S. B. Robbins, C. W. Metcalf, A. J. White, Owen Dwyer, Nicholas Malatesta, Henry G. Dent, Paul A. Cicalla, J. T. Hillsman, Michael J. Doyle, and Patrick Calligan, constituting the board of aldermen of the city of Memphis, and William Hewitt, P. J. Kelly, John Walsh, W. J. Chase, S. J. Camp, A. G. Tuther, E. Keed, J. A. Roush, Joseph Clouston, jr., Thomas, W. M. Harvey, Isaac Happeck, James C. Carpenter, Turner Hunt, Barret E. Barmds,
S. M. Jobe, Gustavus Reder, George E. Page, Jacob Moone, and
183 Gus. A. Morte, constituting the common council of the city of Memphis, and altogether constituting the general council of the city of Memphis.

Whereas it appears from the petition of Pinckney C. Bethell, a citizen of the State of Louisiana, filed herein, that on the 4th of November, 1871, by the judgment of the honorable the first circuit court of Shelby County, Tennessee, the firm of J. and M. Loudon, contractors, recovered of the City of Memphis the sum of thirty-two thousand and eighty-four dollars and eighty-seven cents ($32,084.87), and thirty one dollars and seventy-five cents ($31.75), the cost of the suit, for which execution was awarded, the said judgment remains in full force and unsatisfied, except as follows:

$930.46, paid on the 4th of December, 1871.
$4,000.00, paid 1st April, 1873.
$1,000.00, paid 7th April, 1873.
$3,000.00, paid 5th August, 1873.
$913.43, paid 31st December, 1873, and
$235.00, paid January 7th, 1874.

And it further appearing that the City of Memphis has no property subject to execution at law out of which the said judgment or any
184 part thereof can be made by process of law, and that a writ of execution has heretofore issued on the said judgment and has been delivered to the sheriff of Shelby County, and the same has been returned by him with the return thereon endorsed that there is no property whereon to levy for the satisfaction of the same.

And it further appears that on the day of 1874, the said J. and M. Louden, for a valuable consideration, by writing assigned and transferred to petitioner the said judgment, and authorized him to enforce the collection of and receive and receipt for the money due on the same in the same manner and with the like effect as they might personally have done; the said assignment is referred to and will be produced on the hearing as part of said petition; and it further appears that said petitionor is advised that he has no remedy by the ordinary course of law to compel the payment of said judgment.

The City of Memphis has altogether failed and neglected for
185 nearly three years to make payment, and its officers when applied to for payment have repeatedly declared that they have no means with which to pay and that they can give petitioner no assurance that at any time in the future they will be in a better condition for making payment of the said judgment than they are at present.

And it further appears that by an act of the general assembly of the State of Tennessee, passed on the 18th day of March, 1873, and approved by the governor on the 24th day of March, 1873, it is provided that when any incorporated city has by virtue of presumed authority to lay special assessments for specific purposes levied and collected taxes or special assessments, the right to make which levy and assessment was after-

wards declared void by the supreme court of the State, said city shall have the power to levy a tax in addition to all other taxes allowed by law to be levied, sufficient to cover the entire cost of the improve-
186 ments, with interest thereon, for which said special assessments were illegally made.

And it further appears that the said judgment was rendered for a balance due from the City of Memphis to the said firm of J. and M. Louden for stone pavement laid down by the said J. and M. Louden in the public streets and alleys in the city of Memphis.

The said pavement was laid down under contracts in writing between the said J. and M. Louden and the City of Memphis, which contracts and the acts of the legislature and the ordinances of the city, under which the same were made, attempted and undertook to require that the cost of constructing the said pavement should be bourne and paid to the said J. and M. Louden, the contractors, by the owners of the property adjoining the streets and alleys on which the pavements were laid, in proportion to the fronts of their respective lots on the said streets & alleys.

After said contracts were made and before the passage of the act by the legislature of the 18th of March, 1873, the supreme court of
187 the State of Tennessee declared that the city of Memphis had no right to make the levy and assessment of the cost of said pavement upon the said abutting property, and that its attempt to do so was void.

Reference is made to the said contracts, acts of the legislature, and ordinances of the city for more particularity and certainty.

And it also further appears that before the levy of taxes for the year 1874, the forty-seventh corporate year, petitioner made a written demand upon the mayor and general council of the City of Memphis for the levy of a tax in addition to all other taxes allowed by law to be levied sufficient in amount to pay the balance due on the said judgment, including interest and costs. But the said city has refused to levy any such tax, or to pay the said judgment, or any part of it, or to provide in any way for its payment, and the balance due thereon as aforesaid remains unpaid, and petitioner is without the means of collecting the
188 same unless he is afforded a remedy by the court here; and

Whereas the said petitioner has obtained from the honorable C. W. Heiskell, judge of the first circuit court of Shelby County, an order that an alternative mandamus be issued to compel you, the said City of Memphis, John Loague, mayor, S. B. Robbins, and others, members of the board of aldermen, William Hewitt and others members of the common council—the said two bodies constituting the general council of the city of Memphis—to pay the petitioner the said sum due him on said judgment, or to proceed without delay to levy a tax in addition to all other taxes allowed by law to be levied on all the taxable property assessed for taxation by the city of Memphis sufficient in amount to pay said judgment, etc.

You are therefore notified and required in default of the payment in full of said judgment, interest, and cost to proceed forthwith
189 and without delay to levy a tax in addition to all other taxes allowed by law to be levied on all the taxable property assessed for taxation by the city of Memphis for the year 1874, the forty-seventh corporate year, sufficient in amount after paying the costs of collection and after making proper allowances for errors and insolvencies to pay the balance due as aforesaid on the judgment as assigned by the said J. and M. Louden to the said petitioner, including interest and costs, and to

cause the same to be collected in the manner prescribed by law and the amounts collected to pay over to the petitioner on account of his said judgment from time to time as received, until the entire balances due shall be paid or appear before the judge of the first circuit court of Shelby County, at the court-house of said court, on Monday, the 28th day of September, 1874, and show cause, if any you have, why you do not do so.

Herein fail not and have you then and there this writ and a re-
190 turn of the manner in which you have executed the same. Witness, B. F. Coleman, clerk of said court, at office, in the City of Memphis, the 4th day of September, 1874.

B. F. COLEMAN, *Clerk*,
By T. P. HOY, *D. C.*

Return to alternative writ of mandamus.

Now comes John Loague, mayor, S. B. Robbins, chairman, Owen Dwyer, C. W. Metcalf, N. Malatesta, H. G. Dent, Paul A. Cicalla, J. T. Hillsman, A. J. White, M. J. Doyle, P. Calligan, William Hewitt, chairman, P. J. Kelly, John Walsh, W. J. Chase, S. J. Camp, Alf Tuther, Jno. A. Roush, E. Keck, Joseph Clouston, J. Thomas, Wm. M. Harvey, T. Happeck, Turner Hunt, Jas. S. Carpenter, Barrett A. Barinds, S. M. Jobe, Gustave Reder, George E. Page, Jacob Moon & Augusti A. Morti, and returns the writ of alternative mandamus issued out of this honorable court and respectively state that they have not obeyed the
191 same for the following reasons:

1st. They have no power under the city's charter to levy a greater tax for the purpose of defraying the general expenses of the city, including the payment of judgments, than one per cent. per annum, and that they have already fulfilled that power by lev'ing the one per cent. per annum on all the taxable property of the city, and after discharging the actual expenses incurred in Salamo street improvements and all other expenses of government that cannot be postponed there has been as much paid on said judgment as was possible and practicable to be paid and quite as much as the proportional part that relator is entitled to, taking into consideration the rights of other judgment creditors.

2d. Relator's judgment does not come within the provision of the act of the legislature of Tennessee passed March 18th, 1873, for this reason: The said judgment was based, as the record shows, upon promissory notes executed by the mayor for paving with stone down on street crossings, and along Front street and on the levy and streets leading along
192 to the levy which the city was bound to pay, and which it contracted to pay originally without reference to the liability of individuals who owned the property.

These notes were for stone paving done in front of the public property in which no question of the city's right to contract was ever raised or tried by any court and which was the same as any other contract debt of the city.

Therefore the act of March, 1873, does not apply to this case and does not give the general council power to levy the tax as commanded by your honor's writ.

Wherefore they make this their return.

Third. The act of March 18, 1873, is unconstitutional and void in this: that it is retroactive and seeks to make a contract for the city which the city did not and never would have made for itself and the legislature

has no power to make such contracts or to pass any retroaction laws whatever.

193 Fourth. The original owners & holders of said notes and the judgments upon them accepted two notes as a compromise of their claims against the city and as payment for said work and adheared to their contract up to the time of the assignment to relator; and now the relator has no rights under the assignment of the judgment which had been waived or concluded by the assignors.

For these reasons defendants have not obeyed your honor's writ; and they now here return these facts which they are advised are good and sufficient in law why they should not obey said writ, and why the same should be disallowed and relator's petition dismissed.

In testimony of the foregoing, John Loague, mayor, has hereto set his hand and caused to be affixed the seal of the city of Memphis this 26th day of September, 1874.

[SEAL.] JNO. LOAGUE, *Mayor.*

194 (Endorsed:) Filed Sept. 25th, 1874. F. W. Royster, jr., d. clerk.

Demurrer and replication.

In the first circuit court.

P. C. BETHEL
vs.
CITY OF MEMPHIS.

The plaintiff demurs to the firs' paragraph of the pretended return because—

1st. It is not responsive to the writ.

Second. It states no reason why the tax the alternative writ commands the levy of should not be levied.

And the plaintiff demurs to the third paragraph of the pretended writ because the act of the legislature referred to in it is valid and is not unconstitutional. And the plaintiff demurs to the fourth paragraph of the pretended return, because—

195 1st. The taking of the notes of the city did not change the nature or character of the debt due to J. and M. Louden, nor prevent their having the remedy for its collection provided by the act of the 18th March, 1873.

Second. The plaintiff, as assignee of J. and M. Louden, has all the remedies for the collection of the judgment that the said J. and M. Louden had before the assignment.

And for a replication to the second paragraph of the said pretended return the plaintiff says: That it is not true that the judgment of the plaintiff was based on promissory notes executed for paving done in front of the public property on street crossings and along Front street and on the levee and the streets leading to the levee which the city was bound to pay for and originally contracted to pay for without reference to the liability of the individuals who owned the property in front of which

196 the paving was done; on the contrary the said judgment was rendered for the price of paving laid down by the said J. and M. Louden, under contracts with the city, by which the city undertook to require that cost of constructing the pavements should be paid by the owners of the property adjoining the pavement, as stated in the alterna-

tive writ; *of* and this the plaintiff prays may be enquired of that country.

RANDOLPH, HAMMOND & JORDAN,
Atty's for Plain'.

(Endorsed:) Filed Sept. 30th, 1874. F. W. Royster, jr., D. C.

On, to wit, the 4th day of January, 1875, the following appears of record, to wit:

Order overruling demurrer.

P. C. BETHEL
vs.
CITY OF MEMPHIS. } 713 R. D.

The demurrer filed herein, to the return to the writ of man-
197 damus is sustained.

On, to wit, the 11th day of January, 1874, the following appears of record, to wit:

Leave to file amended replication, &c.

P. C. BETHEL
vs
THE CITY OF MEMPHIS.

Plaintiff, by leave of the court, withdraws his replication, herein filed on the 30th of September, 1874, to the second paragraph of the return of the defendant to the alternative writ, being the part not demurred to; and leave is granted him to file an amended replication to the said part of the said return.

Amended replication.

In the first circuit court.

P. C. BETHEL
vs.
THE CITY OF MEMPHIS.

198 The plaintiff, by leave of the court first had, having withdrawn his replication herein filed on the 30th day of September, 1874, to the second paragraph of the return of the defendant to the alternative writ, being the part not demurred to, now for amended replication to the said part of the said return, says:—

It is true that the judgment now owned by the plaintiff was based on promissory notes executed for stone paving done in the public streets and alleys of the city of Memphis, including Front street, and the streets leading to the levee or wharf in front of or abutting the public property owned by the city, and at intersections or crossings of the public streets and alleys, and was not based on any other debt or liability.

The said stone paving was laid down by J. and M. Louden, under written contracts entered into between them and the city of Memphis, which contracts purported to bind and to be made in behalf of all per-

sons, including the city of Memphis, owning property fronting or
199 abutting on the streets or alleys in which the paving was laid down in and by the said contracts; the cost of the said paving was charged upon and was made payable to the owners of the property adjoining the streets or alleys on which the paving was laid down, and was appo'tioned among the said owners in proportion to the fronts of the property owned by them respec tvely, abutting the said streets and alleys and was declared to be a lien on the abutting property, as well as a personal liability of the owners respectively; and the city of Memphis and the other owners of property abutting the streets and alleys paved, were by the said contracts, placed exactly upon the same basis as to liability to pay for the said paving, and the proportions they were respectively to pay were apportioned by the same rule, and were to be collected and paid in the same manner; and the city of Memphis being the owner of the public property, and of the public streets and alleys, the
200 cost of the paving laid down in the public streets and alleys at their intersections, and the cost of the paving done in front of the public property, or any *and any* street and alley by the said contracts was impased upon, and assumed by the city of Memphis as the owner of the said adjoining or abutting property, and was to be paid to the said J. and M. Louden by the city, in the same manner and upon the same terms and conditions that other owners of property, situated similarly, were subject to, and under and by virtue of the said contracts, and by virtue of them only, the city of Memphis became liable to the said J. and M. Louden for the paving for which the said notes were given as aforesaid, and the judgment now owned by the plaintiff, as aforesaid, was based solely on the said liability; and the plaintiff says, that the said contracts were made, under, and by virtue of ordi-
201 passed by the board of mayor and aldermen of the city of Memphis, in termsathorizing them, and that the said ordinances were passed in pursuance of a provision in the amended charter of the city of Memphis, as granted by the legislature of the State of Tennessee, on the 24th day of November, 1866, in terms authorizing the said ordinances, and the said contracts.

And the plaintiff further says that many of the owners of the property abutting the paving done, including the city of Memphis, paid parties of the cost of the paving so allotted and appointed to them to the said J. and M. Louden, as agreed upon in and by the said contracts, but they and each of them wholly failed to pay the po'tion of the said cost represented by the judgment now owned by the plaintiff; and the plaintiff further says that long prior to the 18th day of March, 1873, the supreme court of the State of Tennessee in a cause before
202 it, held and decided that the supposed or presumed authority by which the city of Memphis had attempted to charge, appo'tion, and collect the cost of the said paving had no existence, and that the said provision of the city charter, the said ordinances, and the said contracts were alike void, and so the plaintiff says that his said judgment represents a part of the entire cost of improving the public streets and alleys of the city of Memphis, by paving the same with stone, done by the said J. and M. Louden, under the said contracts, and that the presumed authority by virtue of which the cost of the said paving was specifically assessed and charged upon the property abutting the street and alleys in which the same was laid down has been by the supreme court of the State of Tennessee declared void and that the tax required by the al-

ternative writ of mandamus to be levied for the satisfaction of his said judgment ought to be levied as therein required.

RANDOLPH, HAMMOND & JORDAN,
For Plaintiff.

203 (Endorsed:) Filed January 11, 1875. B. F. Coleman, clerk.

Agreed statement of facts.

In the first circuit court.

P. C. BETHEL
vs.
THE CITY OF MEMPHIS.

It is agreed as a fact, for the purposes of this case, that the notes on which the judgment of J. and M. Louden against the city of Memphis assigned by them to the petitioner and mentioned in the alternative writ, was based, were given for stone paving laid down under written contracts with the city by the said J. and M. Louden at the intersections of the public streets and alleys, and in the public streets and alleys in front of the public property of the city and were not given for
204 paving done in front of the property of private citizens. The said contracts between the city of Memphis and the said J. and M. Louden, under which the said paving was so laid down (a copy of one of which is annexed hereto, marked A, the others being the same in substance), and the ordinances of the city and the provisions of the charter under which the said contracts were made, which are also here refer'ed to and made a part of his agreement, for more particularity and certainty.

The said ordinance so referred to is contained in the Memphis city ordinances for 1867, Chapter XI, Article I, pages 326 and 329, and that and the provisions of the charter may be read as a part of this agreement from the printed book. done this 30th day of December.

P. C. BETHEL,
By RANDOLPH, HAMMOND AND JORDAN,
Attorneys.

G. A. HAMSON, *City Att'y.*

205 EXHIBIT A.

Street pavements. 1867, *No.* 1.—*Form of agreement.*

For regulating and paving with trap blocks the carriage-way of Front street from Market street to Union street.

This agreement made and concluded this twenty-second day of March, in the year of our Lord one thousand eight hundred and sixty-seven (1867), by and between the mayor and aldermen of the city of Memphis of the first part, and James Louden and Milton Louden, contractors of the second part, of Shelby County, Tennessee, witnesseth:

That the said party of the second part has agreed, by these presents, does agree with the said parties of the first part for the consideration hereinafter mentioned and contained and under the penalty ex-
206 pressed in a bond bearing even date with these presents, and hereto annexed, to furnish at his own proper cost and expense all

the necessary materials and labor, and in a good, firm, and substantial manner regulate and pave with stone blocks the carriage-way of Front street from Market street to Union street, and lay and relay the necessary curbstone in the manner and under the conditions hereinafter mentioned, and has further agreed that the said corporation or their agents shall be and are hereby authorized to appoint such person or persons as they may deem proper to inspect the material, to be furnished and the work to be done under this agreement and to see that the same cor'esponds with the specifications hereinafter set forth, to wit:

SPECIFICATIONS.

1st. All the material furnished and all the work done which in
207 the opinion of said agents of the corporation shall not be in accordance with this specification shall be immediately removed and other material furnished and work done that will be in accordance therewith.

2nd. The work under this agreement is to be prosecuted at and from, as many different points in such part or parts of the street on the *time* of the work, as the said agents of the corporation may, from time to time during the progress of the work, determine, and at each of said points an inspect*ion* will be placed on the day designated for the commencement of the work thereat.

Whenever any work is in progress at more than one point at a time an inspector will be placed at each point to supervise the same whether such work be connected with the curbing of the stone blocks, or with the excavation for and preparation of the foundation, or with the laying of the pavement or otherwise, proper fences or guards are to
208 be erected at night, and a sufficient number of lights kept burning on and near the work from twilight in the evening until sunrise.

The right to construct any sewer or sewers or re*serv*ing basins and culverts in said streets and to grant permits for house connections therewith at any time prior to the laying of the pavement over the line of the same is expressly reserved by said agents of the corporation and said contractor shall not interfere with or place any impediment in the way of any person or persons who may be engaged in the construction of such sewer or sewers, or in making connections therewith, or in setting or resetting any curb or gutter stones on the line of the street under the directions of the city engineer or otherwise.

The line of the pavement at all intersecting streets and alleys, when so required, to extend to the lines of the street to be paved, and all proper connections of gutters or pavements either with paved streets or alleys or with earthwork in the same, to be done by the con-
209 tractor, under the directions of the city engineers, without charge.

3rd. In case there shall be at the time stipulated for the commencement of the work any earth, rubbish, or other incumbrances on the line of the work the same is to be removed at the expense of the contractor.

4th. *Description of the materials.*—The stone blocks are to be durable and uniform quality each measuring on the face or upper surface not less than five (5) nor more than ten (10) inches in length, and not less than three (3) nor more than five (5) inches in width, and in depth no less than six (6) nor more than nine (9) inches, blocks of three (3) inches in width to be the same in width at the base; all other blocks in transverse measurement on the base to be not more than one inch less

than on the face, but no block or the base shall be of less
210 width than three (3) inches in width and to be in all respects equal to the specimen blocks at the office of the city engineer.

They will be carefully inspected after they are brought on the line of the work, and all blocks which in quality and demension do not conform strictly to these specifications will be inspected and must be immediately removed from the line of the work.

The contractor will be required to furnish such laborers, as may be necessary to aid the inspector in the examination and cutting of the blocks; and in case the contractor shall neglect or refuse so to do, such laborers as in the opinion of said agents may be necessary will be employed by said agents and the expense thus incurred by them will be deducted and paid out of any money then due or which may thereafter grow due to the said contractor under this agreement.
211 The blocks may be of any rock equal in hardness to what is called Quincy granate.

5th. *Manholes, heads, and etc.*—All the frames and heads for manholes, and for gas stops-cocks or cisterns on the line of the work are to be constructed or reset on a level with the new pavement under the direction and to the satisfaction of said agents. In case new frames or heads shall be required they will be furnished by the corporation or by the gas company, but the expenses of attending the setting the same is to be bourn' by the said contractor.

6th. *Curbing.*—All new curbing that may be required for sidewalks along the line of the street is to be composed either of good limestone of approved quality, or fine grained Ohio River blue freestone from the Buena Vista quarry, to be not less than five (5) inches in thick-
212 ness, and sixteen (16) inches deep, and in length not less than three (3) nor more than six (6) feet the top, and eight (8) inches deep of the face, and four and one-half inches deep of the back, to be properly *pammer* [rammed], dressed, and the outer iris to be rounded with a radius of three-quarters of an inch, the joints to be close to a joint not less than two inches below the top of the pavement; all curbstones at the angles of intersections of streets and alleys to be rounded with a radius of eighteen inches, and at alleys at a radius of twelve inches. Before furnishing any new curbing the contractor shall furnish to the corporation, or their agents, sample of the stone proposed to be used, for approval, and the curbing furnished shall be equal in quality to the samples that shall have been approved; such stone curbing now on the line of the street as the agents of the corporation may determine as proper to remain to be reset and readjusted, whenever re-
213 quired to place the same to the proper line of grade; all curbing to be set on a good foundation, and to be well secured. When sidewalk pavements require changes or repairs on account of the changes in the curbes the same to be done by and at the expense of the abbutters.

7th. *Inspection of materials.*—When brought upon the ground and before they are piled will be carefully and thoroughly inspected as provided for in specifications, and all rejected stone shall be immediately removed by the contractor from the line of the work; the contractor will then be required to pile such stone as may have been approved neatly on the sidewalks, and in such a manner as will permit of free access from the roadway to each house on the line of the street. After this inspection has been made, and after all the rejected stone has been removed entirely from the line of the work, and accepted stone piled in the manner aforesaid, and not until each of these conditions shall

214 have been faithfully fulfilled, will the contractor be permitted to proceed with the preparation of the road-bed for the pavement; it being expressly understood that the work is to be prosecuted in sections of not less than the space between any two intersecting streets, and that these provisions relative to the hauling, inspection, and removal, and piling stone shall apply to the work on each said section on the whole line of the work.

8th. *Preparation of road bed.*—All paving and other stones necessary to be removed shall be taken up, and with the exception of stones to be reserved for the use of said agents, removed immediately from the line of the work, the subsoil or other matter is then to be excavated and thrown into carts furnished by and removed at the expense of the corporation said excavation to be done in subsections of not less than
215 one hundred lineal feet of the full width of the proposed pavement, and to the depth of (12) inches below the top line of the proposed new pavement when fully ram'ed. This is to be done without respect to the character of the subsoil as it now exists to the depth specified above, the material is to be removed and not used on any part of the work. Care must be taken in excavation, to preserve the proper crown, all holes or inequalities to be filled to the proper level with sand or gravel, only such filling to be well and faithfully compacted by rolling or ram'ing before the placing thereon of the said bed upon the foundation as thus prepared is to be laid a bed of clean sharpe sand or gravel only to the depth necessary to bring the pavement to a proper grade, the same to be brought to a uniform surface on the day previous to that on which the paving of such subsections shall be commenced, care being taken to preserve the proper grade or crown; the contractor will
216 compact the sand or gravel-bed thus laid by iron rollers, but no other method of bringing the sand or gravel to a compact body will, in any case, be permitted.

9th. *Layiny the pavement, &c.*—The blocks are to be laid at right angles to the line of the street, with such crown as directed by the city engineer, each course to be of blocks of a uniform width and depth, and so laid that all longitudinal joints shall be broken by a *luss* of at least two inches, when thus laid the blocks shall be th'roughly rammed to a firm unyielding bed with a uniform surface, and to the proper grade and crown, but no rammer shall be applied within twenty-five feet from work progressing or not ready to be rammed. When so rammed the blocks shall be immediately covered with clean, fine gravel and
217 sand, in proper proportions and qualities, and so from time to time and raked until all the joints become filled therewith; the work is then to be again rammed until it is made solid and secure.

10th. *Cross-walks.*—All alleys that are paved with stone to the line of the sidewalk's curb of the intersecting streets, are to have cross-walks of hard lime-stone sawed and brushed on the surface and the edges properly dressed.

The walks to be in two lines, one foot and six inches apart, to be two feet wide and not less than six inches deep, firmly imbedded in gravel.

11th. "*Old materials.*"—All old materials which it becomes necessary to remove excepting such stones as may be required by said agents for the use of the city and excepting the cistern, manhole heads, and
218 the stone curbing on the line of the streets shall be considered as the property of the contractor, and the same shall be immediately removed by him from the line of the work; the stones required by said agents are to be taken up by the contractor and placed in heaps

on the line of the work whence they will be removed by carts in the employ of said agents of the corporation.

12th. *Clearing up.*—All surplus materials, earth, sand, rubbish, and refuse stones are to be removed from the line of the work as rapidly as the work progresses, and until this be done, and a certificate of the city engineer to the effect that the stipulations relative to the removal of all surplus materials, earth, sand, and rubbish from the line of the work has been complied with shall have been obtained and filed in the office of the mayor the work will not be considered as completed according to this agreement.

13th. All loss or drainage arising out of the nature of the work to be done under this agreement, or from any unforeseen obstructions or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from encumbrances on the line of the work to be sustained by the aforesaid contractor.

14th. The prosecution of the work is to be suspended at such times and for such period as the said board may from time to time determine.

15th. Whenever the word contractor and the words party of the second part, and the provisions in the place thereof are used in this contract they are to be considered as referring to, and meaning the party or parties as the case may be of the second part of this agreement.

16th. And the parties of the second part hereby further agree that the said parties of the first part shall be, and are hereby, authorized to retain, out of the moneys payable to him under this agreement, the certain sum of *of* (10) ten cents for each square yard of pavement contracted under this agreement, and to expend the same in the manner hereinafter provided for in making such repairs to the work done under this agreement as the said agents may deem necessary; and it is further agreed that if at any time during the period of six months from the date of acceptance by such agents of the work under this agreement of the said work, or any part or parts thereof, excepting only such part or parts of the work as after the completion thereof may have been disturbed in the construction or repair of sewers or drains or in relaying or repairing of gas or water mains and service-pipes, shall, in the opinion of said agents, require repair, and the said agents shall notify the said party of the second part to make the repairs so required, the said party of the second part will immediately commence and complete the same to the satisfaction of said agents; and in case of failure or neglect on his part so to do within 48 hours of the date of the service of the aforesaid notice, that then the said agents shall have the right to purchase such materials as they may deem necessary, and to employ such person or persons as they may deem proper, and to undertake and complete the said repairs, and to pay the expense thereof out of the said certain sum retained for this purpose by the said parties of the first part, as before mentioned; and the parties of the first part hereby agree, upon the expiration of the said period of six months, provided that the said work shall at that time be in good order, which fact shall be determined by a certificate to that effect, signed by the city engineer, endorsed by the mayor, to pay to the party of the second part of the sum last aforesaid as may remain after the of making the said repairs in the manner aforesaid shall have been paid therefrom.

A. The said party of the second part further agrees that the return of the city engineer, endorsed by the mayor, shall be the account by which

the amount of work done shall be completed, and that he shall not be entitled to demand or receive payment for any work upon, in, or about the said work, as extra work, or unless ordered in writing by the
223 said agents of the corporation to be the same as extra work, and a price therefore agreed upon previously to its commencement.

The party of the second part further agrees, and they hereby authorize the parties of the first part to reverse the right to make any changes in the work to be done under this contract, or in the materials used for them, for which they from time to time during its progress may deem expedient, and the contractor, upon notice of said changes to be made, is to proceed as directed by said notice and the value of said changes either in increasing the cost of the work to be done under this contract or of the materials employed therefor, or diminishing the same, to be estimated in proportion to the contract price of the work and materials of a like nature done under this contract, and the value of said charges to be added to the amount to be paid under this contract or de-
224 ducted therefrom, as the case may be, and that said changes shall in no way vacate or render void the conditions of this contract.

B. The party of the second part hereby further agrees that he will commence the aforesaid work on the first day of May, 1867, and at such point or points as said agents of the corporation may designate, and fully complete the same in accordance with this agreement, on or before the expiration of the first of November, 1867; that he will give his personal attention constantly to the faithful prosecution of the said work; that he will not sublet the aforesaid work, but will keep the same under his own control, and that he will punctually pay the workmen who shall be employed on the aforesaid work, and in cash current.

C. And the said party of the second part hereby further agrees
225 that the said parties of the first part shall be, and they are hereby, authorized to deduct and retain out of the moneys which may be due, or become due to the said party of the second part under this agreement, the sum paid for the inspector or inspectors' wages, for each and every day the aggregate time may exceed the time heretofore stipulated for the completion of the whole of the work under this agreement, and the said parties of the first part hereby agree to pay to the said party of the second part the sum of $ per day for each and every day that the aggregate time of said inspection may be less than the time herein'fore stipulated for its completion.

D. The said party of the second part further agrees that if at any time the said agents of the corporation shall be of the opinion,
226 and shall so certify in writing, that the said work, or any part thereof, is unnecessarily delayed, or that the said contractor is willfully violating any of the conditions or covenants of this contract, or is executing the same in bad faith, they shall have the power to notify the aforesaid contractor to discontinue all work under this contract, or any part thereof, and thereupon the said contractor shall cease to continue said work, or such parts thereof, and the said agents shall thereupon have the power to place such and so many persons as they may deem advisable, by contract or otherwise, to work at and complete the work herein described, or any part thereof, and to use such materials as they may find upon the line of said work for the completion of the same, and to charge the expense of said labor and materials
227 to the aforesaid contractor, and expense so charged shall be deducted and paid by the parties of the first part out of such moneys as may be then due, or may at any time thereafter grow due to

the said contractor under and by virtue of this agreement, or any part thereof, and in case such expense is less than the sum which would have been payable under this contract, if the same completed by him, he shall be entitled to receive the difference, and in case such expense shall exceed the last said sum he shall pay the amount of such excess to the parties of the first part on notice from the said agents of the excess due.

E. And the said party of the second part hereby further agrees that he will furnish the said agents of the corporation with satisfactory
228 evidence that all persons who have done work or furnished materials under this agreement, or who may have received or sustained any damage or injury through or by reason of any act or omission, careless-ness or want of skill on the part of the said contractor or his agents in the prosecution of the work aforesaid, that any balance for such work or materials, or compensation for such damage or injury is still due and unpaid have been fully paid or secured, and in case such evidence be not furnished as aforesaid, such amount as may be necessary to meet the claims of the persons aforesaid shall be retained from the moneys due the said parties of the second part under this agreement until the liabilities of the aforesaid shall be fully discharged or such notice withdrawn.

229 F. And the said party of the second part further agrees that he will indemnify and save harmless the parties of the first part from all suits, actions of ever' name and description brought against them for or account of any injuries or damages received or sustained by any parties or party, by or from the said party of the second part, his servants or agents, in the prosecution of the said work, or by or in consequence of any negligence in guarding the same or of any improper materials used in its prosecution, or by or on *any* account of any act of omission of the said party of the second part or his agents; and the said party of the second part hereby further agrees that the whole or so much of the moneys due to him under and by virtue of this agree-
230 ment as shall or may be considered necessary by the agents of the corporation shall or may be retained by the said parties of the first part until all such suits or claims for damages as aforesaid shall have been settled, and evidence to that effect furnished to the satisfaction of the said agents of the corporation. And the said party of the second part hereby further agrees to receive the foregoing prices as full compensation for furnishing all the materials and labor which may be required in the prosecution and completion of the whole of the work to be done under this agreement, and in all respects completing the same in the manner before specified, to wit:

For each square yard of stone block pavement laid, the sum of four dollars and twenty-five cents. $4.25.

231 For each lineal foot of new curb stone furnished and laid, the sum of one dollar and seventy-five cents, ($1.75.)

For each lineal foot of the present curb stone relaid, the sum of twenty-five cents, (25c.)

It being expressly understood that the measurement shall be taken after the laying or setting of the stone and that the aforesaid prices cover the furnishing of all the different materials and labor, and the performance of all the work mentioned in this specifications and agreement.

In consideration of the full and faithful performance of each and every of the agreements herein contained, on the part of the party of the second part, the parties of the first part agree to pay or cause to be paid to the second part the prices hereinfofore mentioned.

232 Terms of payment, as follows, to wit:

Upon the completion of each section the contractor shall receive from the owner or owners of lots fronting on said section, one-half of the price of the same in cash, and the remaining half to be paid by said owner or owners in thirty, sixty and ninety days, they giving their notes therefor; the sections will not be less than three hundred and seventy-five nor more than four hundred feet in length.

The accounts of said pavement will be made out upon the completion of each section, by the city engineer, against the property owner or owners, and delivered to the contractor for collection, and if not paid according to the terms above specified, with' ten days after said
233 payments become due said accounts or so much shall be unpaid, shall be placed in the hands of the city attorney, who will proceed to collect the same under the city charter.

The City of Memphis will and do hereby guarantee to the contractor the payment of said accounts as so assessed against the property owner or owners, for said payment according to the plans and specifications.

The sum or sums of money that will become due from the city to the contractor under this agreement for pavement, or parts of streets or alleys, or for streets or alleys, or intersections and etc., to be paid to the contractors in notes of the city, to become due in twelve months from the completion of the work of each section.

In witness whereof the parties to these presents, have hereunto
234 set their hands and affixed their seals, the day and year first above written.

For the Mayor and Aldermen of the City of Memphis:

By the Mayor:

W. O. LOFLAND, [SEAL.]
For the Corporation.
JAMES LOUDON. [SEAL.]
MILTON LOUDON. [SEAL.]
By JOHN LOUDON. [SEAL.]

Signed and sealed in the presence of—
R. T. MORGAN,
R. DUDLEY FRAYSER.

Street paving. 1867. *No.* 2.

Form of agreement for regulating and paving with cross blocks the carriage-way of Centre alley from Market street to Union street, for grading, laying and relaying curb stones, and etc.

The agreement and specifications are the same as the foregoing,
235 for Front street, with the exception that for each square yard of pavement that is laid, the contractor shall receive the sum of three dollars and seventy-five cents, ($3.75.)

The contractors, dates, and witnesses are the same as for the Front street pavement.

Street pavements. 1867. *No.* 3.

Form of agreement for regulating and paving with trap blocks the carriage-way of Second alley, from Market street to Union, for grading, laying, and relaying curbstone, and etc.

The agreement and specifications are the same as the foregoing for Front street, with the exception that each square yard of pavement

that is laid, the contractor shall receive the sum of three dollars and eighty-seven cents ($3.87.)

236 The contractors, dates, and witnesses are the same as for the Front street pavement.

Street pavement. 1867. *No.* 4.

Form of agreement for regulating and paving with trap blocks the carriage-way of the cross-alleys between Market street and Union street, from Front street to Second street, for paving, laying and relaying curbstone, and etc.

The agreement and specifications are the same as the foregoing for Front street, with the exception that for each square yard of pavement that is laid the contractor shall receive the sum of three dollars and eighty-seven cents ($3.87.)

The contractors, dates, and witnesses are the same as for the Front street pavement.

237 First circuit court.

P. C. BETHEL
vs.
CITY OF MEMPHIS.

The foregoing copy of a contract is paper A, referred to in and made a part of the agreement in the case of P. C. Bethel vs. The City of Memphis.

December 30th, 1874.

P. C. BETHEL,
By RANDOLPH, HAMMOND, AND JORDAN,
Attorneys.

(Endorsed:) Filed January 11th, 1875. B. F. Coleman, clerk.

On, to wit, the 3rd day of February, 1875, the following appears of record, to wit:

Peremptory writ of mandamus refused, &c.

P. C. BETHEL
vs.
THE CITY OF MEMPHIS. } F. D. 3293.

238 This cause was this day heard on the petition and the exhibits thereto, the alternate writ, and the return of the defendants to the alternative writ, and the replication to the return, and the agreed statement of facts; and it appearing to the court that the debt due the plaintiff did not accrue in the manner contemplated by the act of 18th March, 1873, chapter 77, page 102 of the acts of 1873, and that the case made is not such as requires the levy of a tax by the city of Memphis for the pavement of the judgment mentioned in the alternative writ.

It is ordered by the court that the peremptory writ of mandamus be refused; that the petition be dismissed, and that the defendants go hence and recover of the plaintiff and his surety in the cost bond all the costs herein expended, for which execution will issue.

And thereupon the plaintiff prays an appeal in the nature of a
239 writ of error to the Supreme Court at the next term thereof, and the same is granted upon his execution an appeal bond in the penalty of two hundred and fifty dollars, conditioned according to law, with good and sufficient security, which bond may be executed at any ime during the term.

On to wit, the 22nd day of February, 1875, the following appears of record, to wit:

Appeal bond given.

P. C. BETHEL
vs.
THE CITY OF MEMPHIS.

The appeal bond executed by the plaintiff under the order herein entered on the 3rd day of February, 1875, is hereby approved, and the appeal prayed is perfected.

Opinion of court.

240 P. C. BETHEL
vs.
CITY OF MEMPHIS. } Mandamus. Opinion.

It being agreed in this cause that the assignor of plaintiff made a contract with defendant to pave with stone the intersections of streets and alleys and in the public streets and alleys in front of the public property of the city; that the city gave its notes for such paving; that the judgments were obtained against the city on these notes, and that property-holders were not specially assessed to pay for any part of the work as they were to pay for the Nicholson pavement laid down in front of their property, the question submitted is, Should the writ of peremptory mandamus be awarded in this case? Plaintiff's counsel consede that if the case does not fall within the act of 1873, Chapter LXXVII, page 102, the writ should not issue.

241 That act reads: Where any incorporated town or city has, by virtue of [* presumed] authority, to levy special assessments for specific purposes, levied and collected taxes or special assessments, the right to make which levy and assessment was afterwards declared void by the supreme court of the State, said town or city shall have the power to levy a tax in addition to all other taxes allowed by law to be levied, sufficient to cover the entire costs of the improvement, with interest thereon, for which such special assessments were illegally made, and in the levying of such additional tax any sum or sums, with interest, paid by persons in satisfaction, or part satisfaction, of said special assessment illegally levied and collected as aforesaid.

It will be observed that the tax contemplated by the act is a
242 tax to cover the cost of improvements for which special assessments have been illegally made.

It contemplates relief to that class of citizens who have paid such illegal assessments, and when such assessments have been declared illegal or void by the supreme court of the State.

Now, on the agreed facts in this case there were no special assessments which the supreme court afterwards declared illegal or void.

* In pencil.

Second. If assessments have been made it would have been upon the citizens of the city and not the character of assessments declared illegal or void by the supreme court, and an assessment on the whole city as other taxes are assessed would have been unquestionable legal, and would not be declared void by any court.

243 Third. No special assessment, no illegal assessment was made in the case at bar, because the facts show that no assessments were made at all, and hence none have paid such illegal assessments.

It is therefore clear that the case does not fall within the act, neither the reason or better of it, and the writ is therefore refused.

C. W. HEISKELL,
Judge.

Appeal bond.

Know all men by these presents, that we, P. C. Bethel and W. M. Sneed, are held and firmly bound unto the city of Memphis and assignees in the penal sum of two hundred and fifty dollars, for the payment of which well and truly to be made and done we bind ourselves and each of us, our heirs, executors, administrators and

244 assigns, both jointly and severally, firmly by these presents, sealed with our seals and dated this 22d day of February, A. D. 1875.

But the condition of the above obligation is such, that whereas the above bounden P. C. Bethel, has this day prayed and obtained an appeal in the nature of a writ of error to the next supreme court to be held for the western division of the State of Tennessee, at Jackson, on the first Monday in April next, from a judgment which the City of Memphis has obtained against him in the first circuit court of Shelby County, at the January term and on the 3rd day of February, 1875, for costs of suit:

Now if the said appellant prosecute his said appeal with effect, or in case he fail therein, do pay and satisfy, abide by and perform the judgment, order, or decree of the said supreme court to be had therein,

245 and all such costs as may be awarded against him for wrongfully prosecuting said appeal, and any event, to pay all cost' adjudged against said Bethel in said case, then this obligation to be void; otherwise to remain in full force and effect.

W. M. SNEED. [SEAL.]

(Endorsed:) Filed Feb. 22d, 1875. B. F. Coleman, clerk.

Judgment of supreme court.

And *and* at, to wit, on Tuesday, June 8th, 1875, one of the days of the said special June term, 1875, of said supreme court, the following judgment:

P. C. BETHEL,
vs.
THE CITY OF MEMPHIS. } 361. Shelby law D.

The parties appear, by their attorneys, and thereupon the record, proceedings, and judgment of the court below in this cause being seen and fully understood by the commission, and it appearing that

246 in the same there is no error, it is therefore considered that the judgment aforesaid be in all things affirmed and the petition for

mandamus be dismissed, and that the defendants in error recover of the plaintiff in error and Wm. Sneed, his surety on appeal bond, the cost of this cause in this court and the court below, for which let execution issue.

THE STATE OF TENNESSEE:

I, John H. Freeman, clerk of the supreme court of said State for the western division of said State at Jackson, do hereby certify that the above and foregoing is a full, true, and perfect transcript of the record and proceedings had in a certain case lately determined by said supreme court, wherein P. C. Bethel was plaintiff in error, and the city of Memphis defendant, as the same appears of record on file in my office.

247 In testimony whereof, I have hereunto set my hand and affixed the impress of the seal of said court, at office in the city of Jackson, this 4th day of December, A. D., 1876, and 101st year of American Independence.

[SEAL.]

JOHN H. FREEMAN, *Clerk*,
By S. D. HAYS, *D. C.*

(Endorsed:) Eq. 243. P. C. Bethel vs. The City of Memphis. Transcript. Clerks fees $21.50, paid by W. M. Randolph, esq. Jno. H. Freeman, cl'k. No. 243. Circuit court of the United States, western district of Tennessee. James A. Loudon vs. The City of Memphis.

248 Transcript. Filed Dec. 8th, 1876. H. E. Andrews, clerk, by L. H. Pillsbury, D. C.

249 250

251 Pleas at a term of the first circuit court begun and held for the county of Shelby, State of Tennessee, at the court-house, corner of Second and Union streets in the city of Memphis, on the third Monday, being the 18th day of September, A. D. 1871, the honorable Carrick W. Heiskell, judge of said first circuit court of Shelby County, present and presiding; Frank Faft, clerk of said court, and Benj'n F. Coleman, Leidy E. Boswell, and Barney H. Coleman, deputy clerks, and Marcus J. Wright, sheriff of Shelby County, Tennessee.

And at, to wit, on the 4th day of November, 1871, being one of the days of the September term, 1871, of said court, the following proceedings were had, to wit:

Summons.

State of Tennessee to the sheriff of Shelby County, greeting:

You are hereby commanded to summon the City of Memphis, if

252 to be found within your county, personally to be and appear before the judge of the first circuit court of Shelby County, at a term of said court to be held for said county, at the court-house in the city of Memphis, on the third Monday in January next, then and there to answer J. and M. Loudon in an action of debt one hundred thousand dollars due by note and account.

Herein fail not, and have you then and there this writ.

Witness Frank Faft, clerk of the said court, at office, the third Monday in September, 1870.

FRANK TAFT, *Clerk*,
L. E. BOSWELL, *Deputy Clerk*.

Bond.

I bind myself to the above named defendants in the sum of two hundred and fifty dollars for the successful prosecution of the above action; to be void on condition that I pay all the costs which may at any time be adjudged against the plaintiffs in the event that they shall
253 not pay the same; otherwise to remain in full force.

Witness my hand this 8th day of December, 1870.

G. A. HANSON. [SEAL.]

(Endorsed:) Issued 8th day of December, 1870. Frank Taft, clerk. L. E. Boswell, D. C.

Came to hand 8th day of December, 1870, and executed same day on Jno. Johnson, mayor of Memphis, by making known contents of this writ to him.

MARCUS J. WRIGHT, *Sh'ff.*,
By W. W. COLEMAN, *D. Sh'ff.*

Declaration.

J. AND M. LOUDON
vs.
THE CITY OF MEMPHIS.

First circuit court of Shelby County, January term, 1871.

The plaintiffs sue the defendant for one hundred thousand dollars ($100,000.00) evidenced by one hundred and seven (107) promis-
254 sory notes, true and exact copies of which are here to the court shown, numbered, dated, and described as hereinafter set forth, and all made by the mayor and aldermen, defendant, and payable to plaintiffs, which, with interest thereon, are due and remain unpaid, to wit:

No. 1612, $1,000.00, of date Feb. 22, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1613, $1,000.00, of date Feb. 22, 1868, payable to J. and M. Loudon twelve months after the date thereof.

No. 1615, $1,000.00, of date Feb. 22, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1616, $1,000.00, of date 22 Feb'y, 1868, payable to J. and M. Loudon twelve months after the date thereof.

No. 1620, $1,000.00, of date Feb. 28th, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1622, $1,000.00, of date Feb'y 28th, 1868, payable to J. and M. Loudon twelve months after the date thereof.

No. 1649, $269.64, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

255 No. 1650, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after the date thereof.

No. 1651, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1652, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof,

No. 1653, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1654, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1655, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1656, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1657, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1658, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1659, $500.00, of date 7th May, 1868, payable to J. and M.
256 Loudon twelve months after date thereof.

No. 1660, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1661, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1663, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1664, $500.00, of date 7th May, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1682, $1,000.00, of date 8th June, 1868, payable to J. and M. Loudon twelve months after the date thereof.

No. 1684, $1,000.00, of date 8th June, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1636, $1,000.00, of date June 8, 1878, payable to J. and M. Loudon twelve months after date thereof.

No. 1687, $1,057.77, of date June 8, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1688, $1,000.00, of date June 8, 1868, payable to J. and M. Loudon twelve months after date thereof.

257 No. 1695, $1,000.00, of date July 8, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1699, $1,000.00, of date July 8, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1701, $1,000.00, of date July 8, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1702, $1,240.13, of date July 8, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1737, $481.49 of date Oct. 13, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1744, $1,400.00, of date Dec. 7, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1745, $1,000.00 of date Dec. 7, 1868, payable to J. and M. Loudon 12 months after date thereof.

No. 1746, $1,000.00, of date 7th day of Dec'r, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1747, $1,000.00, of date Dec'r 7, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1750, $1,000.00, of date 7th Dec'r, 1868, payable to J. and M. Loudon twelve months after date thereof.

258 And the following described notes are made by defendant payable to W. H. Bridges, defendant's treasurer, for the sums and on the dates as follows, to wit:

One note for, No. 1753, $500.00, of date 23 Dec'r, 1868, payable to W. H. Bridges twelve months after date thereof.

No. 1754, $500.00, of date 23 Dec'r, 1868, payable to W. H. Bridges 12 months after date thereof.

No. 1755, $500.00, of date 23 Dec'r, 1868, payable to W. H. Bridges twelve months after date.

No. 1756, $500.00, of date Dec'r 23, 1868, payable to W. H. Bridges 12 months after date thereof.

No. 1757, $500.00, of date Dec'r 23, 1868, payable to W. H. Bridges 12 months after date thereof.

No. 1759, $500.00, of date Dec'r 23, 1868, payable to W. H. Bridges twelve months after date thereof.

No. 1760, $500.00, of date 23 Dec'r, 1868, payable to W. H. Bridges twelve months after date thereof.

No. 1761, $500.00, of date 23 Dec'r, 1868, payable to W. H. Bridges twelve months after date thereof.

259 No. 1765, $530.00, of date 23 Dec'r, 1868, payable to W. H. Bridges twelve months after date thereof.

No. 1766, $500.00 of date 23 Dec. 1868, payable to W. H. Bridges twelve months after date thereof.

No. 1816, $500.00, of date June 1, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1817, $500.00, of date 12th August, 1869, payable to W. H. Bridges twelve months after date.

No. 1818, $500.00, of date June 1, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1819, $500.00, of date June 1, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1820, $500.00, of date June 1, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1821, $500.00, of date June 1, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1822, $500.00, of date June 1, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1823, $662.50, of date June 1, 1869, payable to W. H.
260 Bridges twelve months after date thereof.

No. 1824, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1825, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1826, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1827, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1828, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1829, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1830, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1831, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1832, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

261 No. 1833, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1834, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1835, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1837, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1838, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1839, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1912, $634.32, of date 2 Oct., 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1840, $500.00, of date 19th June, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1841, $500, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1842, $886.40, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

262 No. 1836, $500.00, of date June 19th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1882, $500.00, of date Aug. 12th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1883, $500.00, of date Aug. 12th, 1869, payable to W. H. Bridges on demand.

No. 1885, $500.00, of date Aug. 12th, 1869, payable to W. H. Bridges on demand.

No. 1886, $500.00, of date Aug. 12th, 1869, payable to W. H. Bridges on demand.

No. 1887, $500.00, of date Aug. 12th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1870, $500.00, of date July 27th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1871, 463.48, of date July 27th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1875, $500.00, of date Aug. 12th, 1869, payable to W. H. Bridges on demand.

No. 1876, $500.00, of date Aug. 12th, 1869, payable to W. H. Bridges on demand.

No. 1881, $500.00, of date Aug. 12th, 1869, payable to W. H. Bridges twelve months after date thereof.

263 No. 1880, $664.08, of date Aug. 12th, 1869, payable to W. H. Bridges on demand.

No. 1888, $500.00, of date Aug. 12, 1869, payable to W. H. Bridges on demand.

No. 1889, $500.00, of date Aug. 12, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1890, $500.00, of date Aug. 12th, 1869, payable to W. H. Bridges twelve months after date thereof.

No. 1911, 634.32, of date Oct. 2nd, 1869, payable to W. H. Bridges twelve months after date thereof.

All of which notes were endorsed and delivered to plaintiff by said Bridges as treasurer for defendant.

No. 1762, $500.00, of date Dec'r 7th, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1763, $500.00, of date Dec. 7th, 1868, payable to J. and M. Loudon twelve months after date thereof.

No. 1767, $500.00, of date Jan'y 14th, 1869, payable to J. and M. Loudon twelve months after date thereof.

No. 1768, $500.00, of date Jan'y 14, 1869, payable to J. and M. Loudon twelve months after date.

No. 1769, 500$, of date 14th Jan'y, 1869, payable to J. and M.
264 Loudon twelve months after date thereof.

No. 1770, 500$, of date Jan'y 14th, 1869, payable to J. and M. Loudon twelve months after date thereof.

No. 1771, $500.00, of date Jan'y 14, 1869, payable to J. and M. Loudon twelve months after date thereof.

No. 1772, $500.00, of date Jan'y 14th, 1869, payable to J. and M. Loudon twelve months after date thereof.

No. 1773, $500.00, of date Jan'y 14th, 1869, payable to J. and M. Loudon twelve months after date thereof.

No. 1774, $500.00, of date Jan'y 14th, 1869, payable to J. and M. Loudon twelve months after date thereof.

No. 1775, $500.00, of date Jan'y 14th, 1869, payable to J. and M. Loudon twelve months after date thereof.

No. 1776, $500.00, of date Jan'y 14, 1869, payable to J. and M. Loudon twelve months after date thereof.

No. 1777, $500.00, of date Jan'y 14, 1869, payable to J. and M. Loudon twelve months after date thereof.

No. 1778, $666.00, of date Jan'y 14th, 1869, payable to J. and M. Loudon twelve months after date thereof.

265 No. 1779½, $500.00, of date Jan'y 14th, 1869, payable to J. and M. Loudon twelve months after date thereof; all of which, with interest thereon, remains due and unpaid, to plaintiffs' damage one hundred thousand ($100,000.00) dollars.

HANSON, SWINGLEY AND DASHIELL,
Pl'tiffs' Att'ys.

Plaintiffs also sue the defendants for one hundred thousand dollars ($100,000) for work and labor done and materials furnished to the defendant at his request and for which defendant promised to pay the plaintiff. Plaintiffs have often demanded payment of defendant, but it has always refused and still refuses to pay said demand, to the plaintiffs' damage one hundred thousand dollars.

HANSON, SWINGLEY AND DASHIELL,
Pl'tiffs' Att'ys.

(Endorsed:) Filed Jan'y 18, 1871. Frank Taft, clerk, by L. E. Boswell, D. C.

Pleas.

In the first circuit court.

266 J. & M. LOUDON
vs.
THE CITY OF MEMPHIS.

The defendant for pleas says that it is not indebted to the plaintiffs in the sums sued for, or any other sums.

W. M. RANDOLPH,
For Defendants.

And for a second plea the defendant says it has fully paid the plaintiffs the several sums sued for.

W. M. RANDOLPH,
For Defendants.

And for a third plea the defendant says the supposed notes of the defendant mentioned in the declaration were issued without authority of law, and are void.

W. M. RANDOLPH,
For Defendant.

And for a fourth plea the defendant says the plaintiffs did no work or labor and furnished no materials for the defendant, or at its request, nor did the defendant promise to pay the plaintiff for any work, labor, or materials.

W. M. RANDOLPH,
267 *For Defendant.*

(Endorsed:) Filed January 21st, 1871. L. E. Boswell, D. C.

Replication.

In the 1st circuit court.

J. AND M. LOUDON
vs.
THE CITY OF MEMPHIS.

Now come the plaintiffs, by their attorneys, and by way of replication deny all the special pleas of the defendant in this behalf filed, and takes issue on the same.

HANSON, SWINGLEY AND DASHIELL,
Pl'ff's' Attorneys.

(Endorsed:) Filed Jan'y 23d, 1871. L. E. Boswell, D. C.

Agreement to abate as to part notes.

J. AND M. LOUDON
vs.
CITY OF MEMPHIS.

268 In this cause the plaintiffs hereby agree to abate their suit so far as the notes described as numbers 1753, 1754, 1755, 1756, 1765, 1766, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1831, 1838, 1839, 1841, and 1870 are concerned, each for $500, except No. 1765, which is for $530, the eighteen notes aggregating $9,030; and the plaintiffs having elected to include the above described notes in their suit in the second chancery court against the said defendant, it is therefore agreed that the above described notes are to be stricken out of said declaration and no recovery to be had as to them.

J. AND M. LOUDON,
By HANSON, SWINGLEY AND DASHIELL,
Attorneys.

(Endorsed:) Filed March 20, 1871. Frank Taft, clerk, by L. E. Boswell, D. C.

269 At, to wit, on the 23 day of March, 1871, being one of the days of the January term, 1871, of said circuit court, the following appears of record, to wit:

Leave to dismiss as to part, &c.

J. AND M. LOUDON
vs.
CITY OF MEMPHIS. } 627, A. D.

In this cause plaintiffs, by attorney, move the court for leave to dismiss their suit as to the notes described as numbers 1753, 1754, 1755, 1756, 1765, 1766, 1816, 1817, 1818, 1819, 1820, 1821, 1822, 1831, 1838, 1839, and 1841 and 1870, as described in their declaration, amount to $9,030, which motion is allowed by the court, the plaintiff to pay the costs of this order.

And at, to wit, on the 20th day of June, 1871, being one of the days of the May term, 1871, of said court, the following appears of record, to wit:

Leave to file plea of set-off.

J. AND M. LOUDON
vs.
THE CITY OF MEMPHIS. } 1450, T. D.

270 On motion, the defendant has leave to file a plea of set-off, and the same is accordingly done.

Plea of set-off.

In the first circuit court.

J. AND M. LOUDON
vs.
THE CITY OF MEMPHIS. }

In this case, by leave of the court first had and obtained, the defendant, for plea, says the plaintiffs were indebted to him at the time this action was commenced in the sum of five thousand three hundred and forty dollars and interest thereon, for damages for the breach of the contract, which is now here shown to the court, entered into between the said plaintiffs and the said defendants, on the 22d day of October, 1870, whereby the said plaintiffs undertook, among other things, to
271 complete the pavement of the alley north of Jefferson street, from 2d street to 4th street, and the alley north of Court street, from 2d street to 4th street, in the city of Memphis, in the manner and with the materials and according to the specifications in said contract contained, on or before the first day of January, 1871; and that the said plaintiffs, by their said contract, further agreed, that for each and every day the completion of the said work should be delayed longer than the said first day of January, 1871, the said plaintiffs would pay to the defendant the sum of thirty dollars, by way of compensation for the non-fulfilment of the said contract in the said regard, and that the said sum should be agreed upon as liquidated damages for the delay which should occur by reason of such non-fulfilment as aforesaid; and defendant avers that, notwithstanding said agreement, the said plaintiffs
272 did not complete the said work on or before the said first day of January, 1871, nor for the space of one hundred and seventy-eight

days thereafter, nor have they paid the said sum of thirty dollars per day for each and every of said days, so delayed as aforesaid; and so defendant avers that plaintiffs are indebted to them in the sum of five thousand three hundred and forty dollars and the interest thereon, which remains due and unpaid, and which he hereby offers to set off against the plaintiff's demand, and claims any excess which may be found to be due defendant.

W. M. RANDOLPH,
City Attorney.

Account set off.

MAYOR'S OFFICE, CITY HALL,
Memphis, Tenn., May 29th, 1871.

Messrs. J. and M. Loudon to the City of Memphis, dr.

For damages default in contract, one hundred and seventy-eight
273 days, at thirty dollars per day, making $5,340.

(Endorsed:) Filed June 20, 1871. B. F. Coleman, D. C.

And at, to wit, on the 4th day of November, 1871, being one of the days of the September term, 1871, of said court, the following appears of record, to wit:

Judgment.

J. AND M. LOUDON
vs.
THE CITY OF MEMPHIS. } 1450. T. D.

Came the parties, by their attorneys, and also a jury of good and lawful men, to wit, J. C. Ward, T. R. Tuggle, Jacob Gans, W. V. Allen, W. A. Ammons, S. Hirsch, C. Flynne, T. S. Jukes, Geo. Provise, J. W. McKinney, L. Ottenheimer and R. F. Wilcox who, being elected, tried and sworn the truth to speak upon the issues joined, upon their oath do say they find the issues in favor of the plaintiffs, and that defendant is indebted to them in the sum of sixty-four thousand six hundred and thirty-one 18–100 dollars, principal and interest, to date upon the notes sued on.

274 And thereupon came the plaintiffs and defendant in open court and requested the court to enter four several judgments as follows, to wit: One for $32,084.87, one for $11,546.31, one for $11,000.00 and one for $10.000.00. Whereupon it is considered by the court that the plaintiffs recover of defendant the sum of thirty-two thousand and eighty-four 87–100 dollars and the costs of suit, for which let execution issue. And by consent of parties, made in open court, it is considered by the court that the plaintiffs recover of defendant the sum of eleven thousand five hundred and forty-six 31–100 dollars, and that plaintiffs pay the costs of this judgment. And by consent of parties, made in open court, it is considered by the court that plaintiffs recover of defendant the sum of eleven thousand dollars and that plaintiffs pay the costs of this judgment. And by consent of parties, made in open court, it is considered by the court that plaintiffs recover of defendant the sum of ten
275 thousand dollars, and that plaintiffs pay the costs of this judg-

ment. Then came the plaintiffs, in open court, and assigned the judgment for thirty-two thousand and eighty-four 87-100 dollars to P. C. Bethell, his heirs or assigns, and it is ordered that the plaintiffs pay the costs of this entry of transfer also.

Assignment of judgment.

For the purpose of securing to J. D. Brewster, guardian, &c., for John F. and J. B. Cobb, the sum of six thousand five hundred and forty dollars, evidenced by our two promissory notes made on the 18th May, 1868, the other on the 24th June, 1871, and due, one at nine the other at six months from date, we do hereby transfer and assign to the said J. D. a certain judgment, this day rendered by the first circuit court of Shelby County against the City of Memphis and in our favor, for the eleven thousand five hundred and forty six dollars and thirty-one cents, being the same amount as was lately held by the
276 said J. D. in notes of said city as collateral security for our notes aforesaid. But it is expressly agreed and understood that when a sufficient sum has been derived from said judgment to pay our said note and the interest thereon, and has been so applied, then the balance of said judgment shall revert back to us absolutely. And it is further agreed that the said J. D. Brewster shall not collect or receive any greater sum than will be sufficient to pay our said note and the interest thereon; but he is to be paid out of the first proceeds derived from said judgment. Witness our hands this November 4, 1871.

J. AND M. LOUDON.

(Endorsed:) Filed Nov. 7, 1871. B. F. Coleman, D. C.

Assignment of judgment, &c.

For the purpose of securing to Mrs. Caroline Schroder the sum
277 of five thousand dollars evidenced by our promissory note made on the first day of February, 1871, and due at twelve months from date, we do hereby transfer and assign to the said Caroline a certain judgment this day rendered by the first circuit court of Shelby County against the City of Memphis and in our favor for the sum of ten thousand dollars, being the same amount as was lately held by said Caroline in notes of said city as collateral security for our note aforesaid. But it is expressly agreed and understood that when a sufficient sum has been derived from said judgment to pay our said note and the interest thereon, and has been so applied, then the balance of said judgment shall revert back to us absolutely. And it is further agreed that the said Caroline Schroder shall not collect or receive any greater sum than will be sufficient to pay our said note and the interest
278 thereon, but she is to be paid out of the first proceeds derived from said judgment. Witness our hands this November 4, 1871.

J. AND M. LOUDON.

Test:
GEO. GANTT.

(Endorsed:) Filed Nov. 7, 1871. B. F. Coleman, D. C.

Agreement.

For the purpose of effecting a dissolution of partnership heretofore existing under the style and firm of J. & M. Loudon, we do, by these

presents, assign and set apart to Milton B. Loudon and Hopkins Loudon the following judgments, viz: 1st. A certain judgment obtained against the City of Memphis, and in favor of the said J. and M. Loudon, for the sum of $32,084.87, in the 1st circuit court in the City of Memphis and county of Shelby and State of Tennessee, authorizing
279 them to collect and enforce payment of the same, but at their own costs and charges, and covenanting that the sum of $17,405.61, and $930.46 are now held as liens on said judgment.

2d. A judgment for the sum of $11,546.31 obtained in *in one* favor, and against the City of Memphis, in the 1st circuit court, in the city of Memphis, county of Shelby, and State of Tennessee; said judgment was rendered November 4, 1871, authorizing them to collect and enforce payment of the same at their own cost and charges, and covenanting that the sums of $5,540 and $334.84 are now held as liens on said judgment by certain known parties.

Executed this 18th day of December, 1872.

JAMES A. LOUDON.
H. LOUDON.
M. B. LOUDON.

(Endorsed:) Filed Dec. 20th, 1872. L. E. Boswell, D. C.

280 *Agreement.*

For the purpose of dissolving the firm of J. and M. Loudon, we do, by these presents, assign and set apart to James A. Loudon two certain judgments against the City of Memphis, and in favor of the said firm of J. and M. Loudon: 1st, for the sum of eleven thousand dollars; said judgment appearing upon the records of the first circuit court, in the city of Memphis, county of Shelby and State of Tennessee, and obtained November 4th, 1871, authorizing him to collect and enforce payment of the same, but at his own cost and charges, and covenanting that the sums of $6,800 dollars and the further sum of 319.00 are now held as liens on said judgment.

2d. A judgment for the sum of ten thousand dollars, obtained also on the 4th day of November, 1871, in the said 1st circuit court of the said county of Shelby and State of Tennessee, and in favor of the
281 said J. and M. Loudon and against the City of Memphis, authorizing him to collect and enforce payment of the same, but at his own costs and charges, and covenanting that the sum of $5,500 dollars and the further sum of $290.70 are now held by parties as liens on said judgment.

Executed this 18th day of December, 1872.

JAMES A. LOUDON.
M. B. LOUDON.
H. LOUDON.

(Endorsed:) Filed Dec. 20, 1872. L. E. Boswell, D. C.

Bill of costs.

Execution No. 1712.

State tax, $5.00; county tax, $2.50		$7 50
Clerk's fees (Frank Taft), writ, bond, & decl., 1.50; 6 dockets, 60		2 10
2 pleas, 50; repl., 25; 3 agreements, 75		1 50

Nonsuit, 25; leave to plead, 25	50	
Filing 3 transfers of judgment, 75	75	
1 spa., 10; jury, 10; judgment, 75	95	
Judg't for costs, 25; copy of costs, 75	1 00	
Record fee, $16.00	16 00	
		22 80

B. F. COLEMAN, *Clerk.*

Copy costs, 25	25	
282 Execution, 40; copy return on fi. fa., 25	65	
		90
Sheriff's fees, M. J. Wright: Ex. writ, $1.00; ex. 1 spa., 25	1 25	
		1 25
		32 45

Execution No. 1713.

Clerk's fees, B. F. Coleman: Execution, &c., copy return, 25.	90	
		90

Execution No. 1714.

Clerk's fees, B. F. Coleman: Execution and copy of return, 90.. 90

Execution No. 1715.

Clerk's fees, B. F. Coleman: Execution and copy of return, 90.. 90

Endorsement on execution 1712: Judgment Nov. 4th, 1871, $32,084.87

Received on the within judgment nine hundred and thirty 46-100 dollars Dec. 4th, 1871.

G. A. HANSON, *Att'y.*

Hold up execution.

G. A. HANSON.

$31.55 costs paid Coleman by pl't'ff March 6, 1874.
For value received I transfer all my interest in the within judgment to Hopkins Loudon.
283 May 21, 1873.

M. B. LOUDON.

This judgment transferred to P. C. Bethell; see Record 2, p. 450-'1, for assignment of this judgment. No property to be found in my county.

EDMONSON.

No property.

EDMONSON, *D. S.*

Endorsements on executions No. 1713.

Judgment Nov. 4, 1871, $11,546.31.
Received on the within judgment three hundred and thirty-four $\frac{88}{100}$ dollars, Dec. 4, 1871.

G. A. HANSON, *Att'y.*

Execution not to be issued until ordered.

G. A. H.

For value received I transfer all my interest in the within judgment to Hopkins Loudon, May 21, 1873.

M. B. LOUDON.

No property to be found.

EDMONDSON.

No property.

EDMONDSON, *D. S.*

Endorsements on execution No. 1714.

Received on this judgment three hundred and nineteen dollars, Dec. 4, 1871.

G. A. HANSON, *Att'y.*

284 Ex. not to issue until ordered.

We hereby transfer to W. A. Goodwyn balance of this judgment amounting to ten thousand six hundred and eighty-one dollars ($10,681) this Jan. 20, 1872.

J. AND M. LOUDON.

For value received I transfer all my interest in the within judgment to Ira M. Hill, sr., May 24, 1873.

JAMES A. LOUDON.

For value received I this day transfer all interest in this judgment to Ira M. Hill, sr., by direction of Jas. A. Loudon, surviving partner of the firm of J. and M. Loudon, Memphis, Jan'y 2, 1874.

WM. A. GOODWYN.

Approved above this day, Jan'y 2, 1874.

J. AND M. LOUDON,
By JAMES A. LOUDON.

This judgment for $11,000 transferred to Jas. A. Loudon by Ira M. Hill Feb'y 20, 1876, as per written transfer exhibited this March 23, 1876.

B. H. COLEMAN, *D. C.*

285 No property to be found.

EDMONDSON, *D. S.*

Endorsements on executions No. 1715.

Judgment, Nov. 4, 1871, $10,000.00.
Received on this judgment two hundred and ninety 70-100 dollars. Dec. 4, 1871.

G. A. HANSON, *Att'y.*

Ex. not to issue until ordered.

This judgment transferred to Caroline Schroder. Transfer on file. This judgment retransferred by Mrs. Caroline Schroder to J. and M. Loudon, and by J. and M. Loudon to the Merchants' Insurance Company May 6, 1872. For value received I transfer all my interest in the judgment to Ira M. Hill, sr., May 24, 1873.

JAMES A. LOUDON.

This judgment for $10,000 transferred to Jas. A. Loudon by Ira M. Hill on Feb'y 20, 1876, as per written transfer exhibited this March 23, 1876.

B. H. COLEMAN, *D. C.*

No property to be found.

EDMONDSON, *D. S.*

STATE OF TENNESSEE,
Shelby County:

286 I, B. F. Coleman, clerk of the circuit court of said county, do hereby certify that the foregoing 43 pages contain a full, true, and perfect transcript of the proceedings had in our said court in the cause heretofore prosecuted and determined therein, between J. and M. Loudon, plaintiff, and the City of Memphis, defendant, as the same appear of record and on file in my office.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at office, this 5th day of June, 1877.

[L. S.] B. F. COLEMAN, *Clerk*,
By JNO. P. SAMUELS, *D. C.*

(Endorsed:) No. . Circuit court. Shelby County, Tenn. B F. Coleman, cl'k. J. and M. Loudon vs. The City of Memphis.
287 Transcript. Filed 2d day of July, 1877. H. E. Andrews, clerk. L. H. Pillsbury, D. C. Clerk's fee, $11.00.

288 Circuit court of the United States, for the western district of Tennessee, in the sixth judicial circuit.

JAMES A. LOUDON,
vs.
THE CITY OF MEMPHIS.

Testimony taken on the part of the complainant, under the 67th rule of practice for the courts of equity of the United States, as amended.

SEPT. 10TH, 1877.

Present, Wm. M. Randolph, counsel for complainants.

Deposition of B. Richmond, taken before S. S. Garrett, special examiner in the above entitled cause.

The said B. RICHMOND being duly cautioned and sworn to tell the truth, the whole truth, and nothing but the truth, deposes and
289 says: My name is B. Richmond; my age is 50 years; I reside in Memphis, Tennessee; my occupation is bank teller and broker since the war.

I have been familiar with the city's bonds, having bought and sold the same for several years past. I am acquainted with the issue of bonds known as the "gold bearing bonds;" they were issued about the first of Mr. Johnson's first term of office, or about the early part of the same. The entire amount was one hundred and eighty bonds, of one thousand dollars each. I think they are thirty years' bonds, bearing interest at six per cent., for which coupons are attached, payable on first days of May and November of each year. These bonds, in proportion to their amount, have been bought and sold as much as any others in the market. I have dealt in these bonds within the last two or three years. They were worth 43, 44 and 45 cents during that time. Prior to the time above referred to I dealt in city bonds gener-

290 ally. Since July 1st, 1872, currency bonds have been worth 40 cents, more or less. This price ruled up to the past two (2) years, since which time they have declined until the present time, at which 30 cents would be a full market price. Last December, after trying the market thoroughly, I sold twelve thousand and five thousand at 30 cents. To-day I do not think the same price could possibly be obtained. Also, for the last few years, ante-war bonds have been 2 or 3 cents higher than those of recent issue.

Since 1872 the difference between gold and currency bonds has been from 3 to 5 cents, in favor of the gold bond.

And further, this deponent saith not.

B. RICHMOND.

Subscribed and sworn to before me, this 10th day of September, A. D. 1877.

S. S. GARRETT,
Examiner.

291 WILLIAM M. SNEED, esq., a witness in behalf of complainants, being duly sworn to speak the truth, the whole truth, and nothing but the truth, in the above entitled cause, deposes and says:

My name is Wm. M. Sneed; my age is 29 years; I reside in Memphis, Tenn.; my profession is that of attorney at law. I was agent and attorney for Mr. P. C. Bethel, commencing about Jan'y 1st, 1873. At this time J. and M. Louden were indebted to Mr. Bethel, the amount of which I never knew, for money previously loaned, and my understanding was that the money was used by Louden to car'y on a contract they had with the city to pave the streets and alleys. This loan was secured by an assignment of a judgment to Mr. Bethel, held by J. and M. Louden against the City of Memphis, and now held by Mr. Bethel under purchase from the Loudens. Mr. Bethel left this claim with me
292 for collection, and I received several payments on it from the city through its then mayor, John Johnson. In the latter part of Mr. Johnson's administration he agreed with me that the whole of said claim should be paid during the term of his office, and he proceeded to car'y it out as follows, to wit: By allowing a certain portion of the tax then being collected for general purposes to be applied toward the payment of this judgment and in order to expedite the collection of said tax he agreed that he would receive an order from me, as agent of Mr. Bethel, in payment of that portion of the tax from the tax-payer, the amount of said order to be credited upon the judgment. Under this proceeding I received several payments on said judgments, and had not Mr. Johnson's term expired, and the payments continued as they were, I would soon have received the whole amount of said judgment. I received nothing after Mr. Johnson's term expired, as his successor,
293 Mr. Loague, refused to do anything in the matter, or to carry out the contract of his predecessor. I have examined Exhibit B to the bill. I do not remember that I knew of the resolution there referred to, but I had repeated conversations with Mr. Johnson on this subject, from which I understood that a certain portion of the tax then being collected could be legally applied to the payment of this judgment, and which he (Mr. Johnson) was proceeding to do under the arrangement aforesaid.

Mr. Johnson knew at the time that Mr. Bethel held this judgment as collateral security for a debt due him, and that the money paid me under this arrangement went to Mr. Bethel. Mr. Louden, being anxious to pay off Mr. Bethel's claim, discounted with such tax-payers as he could

agree with by selling them the orders before mentioned at a discount, with which orders they paid the proportion of the tax that could
294 be applied to the payment of this debt under the agreement aforesaid, he, Louden, bearing the loss, and the tax-payers saving the difference between the amount paid for the order and the order itself at its face value. The amount of discount I do not remember, as Mr. Louden made the agreements himself. The judgment was afterward sold and transferred absolutely by Mr. Louden to Mr. Bethel, and Mr. Bethel now owns the same, and it is unsatisfied. A day or so after Mr. Loague went into office as mayor, I called upon him and stated the agreement between Mr. Johnson and myself, before referred to, and wished to know if he would not continue said arrangement. He stated that he had just come into office, and had not had time to enquire into matters, but would be prepared to answer me in a few days. When I next called, which was shortly thereafter, he declined to car'y out the arrangement. And further deponent saith not.

W. M. SNEED.

Subscribed and sworn to before me this 10th day of September, A. D. 1877.

S. S. GARRETT,
Examiner.

295 JOHN D. BREUSTER, a witness in behalf of complainants in the above entitled cause, being duly sworn, deposes as follows:

My name is John D. Breuster. My age is 69 years. I reside in Shelby County, Tennessee; a planter by occupation. I was acquainted with the members of the firm of J. and M. Louden. In 1869, I loaned this firm six thousand dollars, which they said was to be used in carrying on their contract, of paving, with the City of Memphis. They deposited with me as collateral security some seventeen to twenty thousand dollars of notes of the city, payable to J. and M. Louden. They afterwards brought suit on these notes in the first circuit court, and transferred me the judgment obtained by them in this court. I held them for several years, when I told them I must have the money, when Mr. Louden made an arrangement with Mr. Overton and paid
296 me the amount due me. Loudon, myself, and Mr. Overton went to the bank together. Mr. Overton gave his check to Mr. Loudon, who handed it to me or gave me the money, I don't remember which.

And further deponent saith not.

JNO. D. BREUSTER.

Subscribed and sworn to before me this 11th Sept., A. D. 1877.

S. S. GARRETT, *Ex.*

FREDERICK C. SCHAPER, a witness in behalf of complainants, being duly sworn to speak the truth, the whole truth, and nothing but the truth in the above-entitled cause, deposes and says:

I was comptroller of the city of Memphis during the years 1872 and 1873, and city tax collector during the years 1874 and 1875 and a portion of 1876, and since that time I have been collector of back taxes for said city. I have in my possession, as said back-tax collector, the tax-books for the years 1872 and 1873, and from said books and the
297 books in the city comptroller's office I have obtained the follow-

ing figures. The total assessment of real estate and personal property for the year 1872 is $26, 782, 619 00
General tax on same @ 1 %..... $267, 826 19
Of this amount there was collected up to Jan. 1st, 1874, the sum of..... $185, 152 01
Since that date, and up to Sept. 1st, 1877..... $18, 858 46

Making total collections to Sept. 1st, 1877..... $204, 010 47
The total assessment of real estate and personal property for the year 1873 is..... $28, 217, 969 00
General tax on same @ 1 %..... $282, 179 69
Of this amount there was collected up to Jan. 1st, 1874, the sum of..... $99, 547 59
And since that date up to Sept. 1st, 1877..... $102, 385 78

Making the total collections to Sept. 1st, 1877..... $201, 933 37

I am still collecting on the unpaid balances due for said years,
298 and receive in payment of the same city script or indebtedness, the taxes collected on said years up to Jan. 1st, 1874, and up to the going into effect of the city charter, passed in * * * March, 1875, were payable in cash or its equivalent.

And further deponent saith not.

FRED. C. SCHAPER.

Subscribed and sworn to before me this 11th September, A D. 1877.
S. S. GARRETT,
Examiner.

Deposition of Stephen Fransiola, a witness for complainants in the foregoing cause.

STEPHEN FRANSIOLA, being duly sworn to speak the truth, the whole truth, and nothing but the truth, deposes and says:

My name is Stephen Fransiola. My age is 61 years. I reside in Memphis, Tenn. I knew the firm of J. and M. Louden. They were engaged in paving the streets, alleys, & w'arf of the city. I knew Mrs. Caroline Schroder. I loaned the firm of J. and M. Louden, for Mrs. Schroder, sometime in the year 1869, the sum of six thousand
299 dollars. The firm deposited with me, as collateral security, thirteen of the city's notes, each for the sum of one thousand dollars, and having, I think, twelve months to run. I had control of this transaction, I think, about two years. It was unpaid when it passed out of my hands. I gave it up to Mrs. Schroder herself.

And further deponent saith not.

S. FRANSIOLA.

Subscribed and sworn to before me this 12th September, 1877.
S. S. GARRETT,
Spl. Examiner.

The deposition of James A. Newsome, a witness on behalf of complainants in the foregoing cause.

JAMES A. NEWSOME, being duly cautioned and sworn the truth to tell, deposes and says:

My name is James A. Newsome; my age is years; my occupation has been since January, 1874, comptroller of the City of Memphis. By

the records in my office of comptroller I find that on the 4th day of November, 1871, J. &. M. Loudon recovered of the City of Memphis a judgment for the sum * * eleven thousand five hundred and forty-six
300 dollars and thirty-one cents; on the 4th December, 1871, the city paid G. A. Hanson, plaintiff's attorney, $334.84. On the 24th December, 1873, the next payment was made of ten thousand dollars to H. Louden. On the 31st December, 1873, two other payments were made, one of $627.40 and the other of $584.67. These were the last payments made to J. and M. Louden on this judgment. The interest on the judgment amounting to $1,557.28 was transferred to credit of H. Louden. I find also from the same source that on the 4th November, 1871, J. and M. Louden recovered of the City of Memphis another judgment for $11,000.00. On this judgment, as the records show, the city paid as follows:

December 4, 1871, to G. A. Hanson, pl't'ff's att'y		$319 00
Feb'y 1, 1873, to W. A. Goodwyn		$919 00
June 6, 1873 "	"	$1,000 00
July 3, 1873 "	"	$1,000 00
August 4, 1873 "	"	$1,000 00
Sept. 4, 1873 "	"	$1,000 00
Dec. 31, 1873 "	"	$2,523 40

The interest referred to in the 1st judgment amounting to ($1,557.28) has since been paid in cash to H. Louden, to whom it was
301 transferred.

The same records show that on the 4th November, 1871, J. and M. Louden recovered of the City of Memphis a judgment of $10,000.00 and that on this judgment payments were made as follows:

Dec. 4, 1871, to G. A. Hanson, pl't'ff's att'y	$290 70
Jan'y 14, 1873 " M'ch'ts Ins. Co	$1,500 00
June 6, 1873, " B'k of Commerce	$1,000 00
Aug. 9, 1873 " " " "	$1,500 00
August 14, 1873, Bank of Commerce	$1,764 00
Dec. 31, 1873, J. A. Louden	$209 13

The same records show that on the 4th November, 1871, J. and M. Louden recovered of the City of Memphis a judgment for $32,084.87, and that payments by the city have been made as follows:

Dec. 4, 1871. G. A. Hanson, pl't'ff's att'y	$930 46
Ap'l 1, 1873, P. C. Bethel	$4,000 00
" 7, 1873, "	$1,000 00
Aug. 5, 1873, "	$3,000 00
Dec. 31, 1873, "	$908 00
" " 1873, H. Louden	$5 43
Jan'y 7, 1874, P. C. Bethel	$335 00

As to the $11,000.00 and $10,000.00 judgments the records fur-
302 ther show that they have been paid in full by a new judgment rendered in favor of Jas. A. Loudon in the U. S. court June 22nd, 1876, for $11,157.87, which includes interest on the said judgment up to that time; last judgment remains unsatisfied at this date, Oct. 9, 1877.

And further deponent saith not.

JAMES A. NEWSOM,
Comptroller.

Subscribed and sworn to before me this 12th Sept., A. D. 1877.

S. S. GARRETT,
Spl. Examiner.

Deposition of John Overton, jr., a witness for the complainants in this cause.

JOHN OVERTON, jr., being duly cautioned and sworn, disposes and says:

My name is John Overton, jr.; my age is 35 years; my residence, Memphis, Tenn.; my occupation, dealer in real estate. I knew the firm of J. and M. Louden; they were contractors for laying stone pavement upon the streets and alleys and the wharf of the city of Memphis. On December 24, 1873, I bought from J. and M. Loudon a
303 judgment against the city of Memphis for $10,000 which I used in portion of the city tax for the year 1873; I paid them for said judgment $9,000.

And further deponent saith not.

JNO. OVERTON, JR.

Subscribed and sworn to before me this 12th Sept., 1877.

S. S. GARRETT,
Examiner.

Deposition of G. A. Hanson.

JAMES A. LOUDON
vs.
THE CITY OF MEMPHIS.

I cannot state the date of my first business relations with J. and M. Loudon. I knew them whilst they were engaged putting down the stone pavement on Front street and the levee. This was a heavy and expensive contract, and when the city and citizens had declined to pay for the work plaintiffs became much embarrassed, and employed me to procure the judgments against the city for some $75,000 on the unpaid notes of the city. They also sued for some $45,000, or upwards, due
304 on ⅗, or engineers' certificates. The withholding of these large sums had so crippled plaintiffs in their reso'rces that they had to negotiate large loans—as much, I think, as $20,000 to $30,000—for which they paid enormous rates of interest, as much as 2½ % per month being sometimes paid by them. These loans were made to them by the Emmet Bank, P. C. Bethel, Mr. Breuster, g'dn, and, I think, a widow, whose name I can't recall, but think it was Schroeder. Plaintiffs were forced to obtain these loans because the city refused to pay what she owed them. Plaintiffs were constantly importuning the city authorities for this relief, and I, as their attorney, went to the city hall several times to seek relief for them as the courts were so slow and uncertain, but it was all without avail. Finally, the city had the alleys between Adams and Jefferson streets and Jefferson and Court streets paved, for which, as I am informed, cash was to have been paid, but which the
305 city also refused or failed to pay. A proposition was then made to the city council that if they would provide for the payment of the judgments ($75,000) within a reasonable time, that plaintiffs would fund the other sums ($45,000) in the thirty-year gold bonds of the city, which were perhaps worth 50 c. on the dollar in the market. This embraced $8,000 for the Jefferson and Court alleys, which was to have been paid in cash, and, as will be seen, entailed a loss on plaintiffs of over $22,500. The city accepted this proposition, and the mayor distinctly stated that by appropriating $\frac{3}{10}$ of one per cent. tax, that the debt would

be paid by the following March, being less than a year from the date of compromise. The council made the appropriation. Plaintiff accepted the depreciated bonds, and the matter was considered as settled. But the mayor soon began to neglect payment, and finally failed altogether
to apply the money appropriated to their debt, and plaintiffs were
306 forced to car'y the burden of interest on the loans for a long period—until after I became city att'y—and I do not know when they were finally settled.

I became city att'y Jan'y, 1874, and while acting in that capacity pl't'ff was constantly urging his claim, and Mr. Loague, mayor, refused to account for his predecessors' undertakings, and in the collection of the back taxes he refused to pay the ($\frac{3}{10}$) three-tenths that had been appropriated, and I have no knowledge of any relief ever having been given pl't'ffs. The judgment and bonds were hypothicated as collateral security for Bethel's loan, and my information is that pl't'ffs was forced to sell them out to pay it, but at what price, if so sold, I am not able to state

The sole inducement to the compromise was the agreement by the mayor to pay the $75,000, as stated, within the time stated, and the resolution of the council applying the three-tenths of one per cent.
307 of the general tax for the purpose. I, as att'y, urged this compromise, and even reduced my fees to induce pl't'ff to accept it, believing that the city acted in good faith in making the appropriation. In conversation with the mayor, he always made excuses which I regarded as frivolous, and at any rate the city failed to comply with the contract. How much they paid and the dates of payment, I cannot state, but the unpaid balance was large.

And further deponent saith nto.

G. A. HANSON.

X and int. 1st. How and from what source do you know the rates of interest paid by plaintiffs on their respective loans?

I only know it from the parties who loaned the money, and going over the settlements with the parties where they were made. I made frequent calculations of interest, but particularly when the loan was taken from the Emmet Bank to Col. Bethel.

G. A. HANSON.

Subscribed and sworn to before me this second day of October, A. D. 1877.

S. S. GARRETT,
Sp'l Examiner.

308 I, S. S. Garrett, special examiner, duly appointed by the circuit court of the United States for the western district of Tennessee, in the sixth judicial circuit, do hereby certify that on the several days named in the depositions hereto annexed, I was attended at my office in the United States court rooms in the city of Memphis, Tennessee, by counsel and witnesses aforesaid.

That the said witnesses were duly sworn and examined, and the deposition was reduced to writing and read to the witnesses, and by them subscribed in my presence.

Dated October 10th, 1877.

S. S. GARRETT,
Sp'l Examiner.

(Endorsed:) No. 243. United States circ't c't western dist. Tenn. James A. Loudon vs. The City of Memphis. Depositions of B. Richmond, Wm. M. Sneed, J. A. Newsom, G. A. Hanson, S. Fransiola, Jno. Overton, jr., F. C. Schaper. Filed Oct. 9, 1877. H. E. Andrews, cl'k. L. H. Pillsbury, D. C. Fee of examiner, $12.00.

309 JAMES A. LOUDON, SURVIVING PARTNER, vs. THE CITY OF MEMPHIS. } No. 243. Equity docket.

Circuit court of the United States for the western district of Tennessee.

The answer of the City of Memphis, to the bill of complaint filed against it in the above entitled cause.

Respondent, for answer to said bill, says:

Respondent admits the several contracts for paving substantially as alleged in the bill. The contracts were in writing, and respondent makes no admission as to their terms, except such as may be gathered from the contracts themselves, which plaintiff offers to produce, and respondent requires to be produced. Respondent admits the execution of the notes, and the recovery of four several judgments there on,
310 for the aggregate sum of $64,631.18, in the circuit court of Shelby County, as charged in the bill. Respondent supposes that its officers at the time of the rendition of the several judgments aforesaid, knew that the notes upon which the judgments were based, had been transferred as collateral security for money borrowed by plaintiff's firm, but it denies that it or its officers then or at any other time, had any knowledge of the terms of the loans or rate of interest plaintiff's firm was paying, or had agreed to pay. Respondent admits that it was determined by the supreme court of the State that the assessments upon the abutting property for the cost of said pavement could not be enforced, that the cost thereof must be paid by general tax, and that on account of its guaranty as alleged in the bill, it became indebted to said J. and M. Loudon, in about the sum of $30,000.00. It admits the
311 contract for paving the alley north of Jefferson street, from Second to Fourth street, and the alley north of Court street, from Second to Fourth street. The contract will be produced. And from it, as well as from the statements of the bill itself, it will appear that respondent was never under any liability whatever for the pavement laid under said last mentioned contract. Respondent admits that for the pavement of the two alleys aforesaid, there remained unpaid to said firm of J. and M. Loudon, the sum of $7,833.36, but this respondent was not liable therefor. Respondent admits the agreement evidenced by Exhibit B to the bill, but denies that there was any agreement whatever other than is evidenced by the paper itself. It admits the settlement of September 16, 1872, as shown by Exhibit C to the bill.

Respondent supposes that the list of pavements as shown by Exhibit D is correct, but reserves the right to file a statement of
312 the account from the books of the city comptroller. It denies that $\frac{3}{10}$ or any other portion of the 1 per cent. general tax of 1873, was specially set apart to pay said judgments. It knows nothing of the sale of said judgments by plaintiff's firm, nor of the loss on such sales, nor of the borrowing of money by said firm, or rate of interest paid, and it requires proof of all such allegations of the bill.

Respondent knows nothing of the sale of bonds by said firm, nor of

the losses suffered by such sale or sales. It denies that such sales, if made, were forced by any conduct of this respondent or its officers, or that respondent can, in any event, be held responsible therefor. It denies that it procured the repeal of the act of March, 1873; said act had no effect upon the remedies of said firm, and its repeal could not have been procured with a view to affect their remedies. It denies
313 that said firm was deprived of all profit or compensation for the pavements laid under said several contracts. Upon information it alleges that after deducting all the losses alleged by the bill to have been suffered by said firm there still remained a handsome profit to the firm. Respondent particularly denies that it has in any respect failed to perform any obligations incurred by it under the compromise settlement of Sept. 16th, 1872. It denies that any promise to pay said notes by a given date was made. The three-tenths of the one per cent. general tax for the year 1872 was set apart, appropriated, and applied to the payment of said judgments, and that was all that respondent under the terms of said settlement undertook to do. It denies that any other tax or portion thereof was ever set apart or specially appropriated to the payment of said judgments. It denies that the three-tenths
314 of one per cent. that was so appropriated was diverted to other purposes. The present officers of the city were not in office at the several dates of the transactions referred to in the bill. They have no personal knowledge of said matters. Respondent therefore denies all allegations of the bill not herein expressly admitted. And respondent, having fully answered the bill, does also demur thereto, and assigns the following grounds of demurrer:

1. The bill is without equity on its face.

2. The bill shows no sufficient ground for a recovery of the difference between the face value of the $45,000.00 of bonds received by plaintiff's firm under the settlement of Sept. 16th, 1872, and the market value or actual proceeds thereof. It appears on the face of the bill, not only that the settlement was a full and fair one, without fraud or mistake, but that the firm of J. and M. Loudon thereby secured several
315 important advantages, to wit: (1), said firm received in bonds the sum of about $8,000 for paving the alleys north of Court and Jefferson streets, when under the terms of the contracts there was nothing due on that account; (2), the payment was made in gold bonds, the indebtedness being dischargable in currency; (3), the indebtedness was of a character that no special tax could be levied for its payment, whereas payment of the bonds could be enforced through a special taxing power. These and other considerations induced said firm to make the settlement of September 16th, 1872, and if it were true, as alleged, that respondent as part of the settlement undertook and promised to pay said judgments on or before the 1st day of March thereafter, the failure to perform the promise would afford no ground for a re-
316 scission of the settlement. The law fixes the interest on the judgments as full compensation for the failure to pay them.

3. It appears by the bill that plaintiff adhered to the settlement of Sept. 16th, 1872, from that date to the filing of this bill, never offering to rescind, and realizing during that time all that he could under and from the settlement. His application to rescind comes too late.

4. The bill cannot be maintained as a bill to rescind, except upon an unconditional offer by complainant to restore to respondent all that he has received under the said settlement. The bill does not contain such offer.

5. If the settlement of Sept. 16th, 1872, be rescinded, then complain-

ant must rely and sue upon his original demand for $45,367.89, and it appears by the face of the bill that the original demand is barred by the statute of limitations.

317 6. The substance of plaintiff's complaint is that respondent has failed in the alleged particulars to discharge its money obligations to said firm of J. and M. Loudon. The interest allowed by law is all that can be claimed for such failure.

And now, having fully answered, respondent prays to be hence dismissed with its costs.

CITY OF MEMPHIS,
By J. R. FLIPPIN, *Mayor.*
S. R. WALKER, *City Att'y.*

Attest:
[L. S.] CRABTREE BELCHER,
City Register.

(Endorsed:) No. 243. Equity. Circuit court of the United States, western district of Tennessee. James A. Loudon vs. The City of Memphis. Answer and demurrer of defendant. Filed Mar. 15, 1878. H. E. Andrews, clerk, L. H. Pillsbury, D. C. S. P. Walker, sol. for respondent.

318 In the circuit court of the United States in the sixth judicial circuit for the western district of Tennessee:

J. AND M. LOUDON
vs.
THE CITY OF MEMPHIS. } In equity.

Testimony taken on the part of the defendant under the 67th rule of practice for the courts of the United States as amended by S. S. Garrett, United States commissioner for said district, as special examiner to whom this cause was referred by consent of parties to take the deposition of John Johnson and others in this cause.

WEDNESDAY, *May 8th*, 1878.

Present, Wm. M. Randolph, esq., counsel for complainants; S. P. Walker, esq., counsel for defendant.

JOHN JOHNSON, produced and sworn as a witness on the part of the defendant, deposes and says:

I was mayor of the city of Memphis from January 1st, 1870, to
319 January 1st, 1874. I have read Ex. B to the bill in this case, which states the whole agreement between the city and J. and M. Loudon, and there was no understanding or agreement outside of this, the agreement being fully set forth in this exhibit. I did not agree to pay their judgment by the first day of March, 1873, or on any other fixed date. The three-tenths of the one per cent. of general tax set apart as shown by Exhibit B was faithfully appropriated to the payment of Loudon's judgment so long as I remained mayor. I have never had any contract with the firm of J. and M. Loudon so far as the city was concerned that was not faithfully performed to the best of my ability. The three-tenths of one per cent. was predicated on the assessment of 1872. For the figures I refer to the deposition of Fred. C. Shaper, filed in this cause. The firm of J. and M. Loudon knew the basis on which the three tenths of one per cent. was arrived at as being suffi-

320 cient to pay their judgment, as well as I did. There was no agreement as to the portion of taxes to pay J. and M. Loudon's judgment after the year 1872, but there was a tacit understanding that they should be paid as fast as possible, and that if the taxes of 1872 were not sufficient they should be paid out of the next year's taxes. I find that Hopkins Louden, in his testimony, states as follows: "In the conversations between Mayor Johnson and Milton B. Louden, above spoken of, prior to the arrangement or compromise, Mayor Johnson said, and said repeatedly, that J. and M. Loudon would get the money due them on the judgments during the fall or winter of 1872–'73, and certainly by March, 1873. He also promised to have a resolution passed by the general council similar to the resolution in Exhibit B to the bill, so as to put the matter beyond doubt." So far as my saying that J. and M. Loudon would get the money, I certainly could
321 not have said as the witness states. I did or may have said they would get a larger portion of their money within the time stated, but that was a mere expression of opinion on my part as to the amount the city would realize from collection of taxes. I certainly did not promise that they should have their money within a specified time, or make any promises outside of what is shown in the agreement, except the promise to use my best endeavors to get it for them as soon as possible, or as soon as taxes could be collected, which promise I faithfully fulfilled, so far as I can now remember. I made no promise to have any resolution passed, except that referred to in Exhibit B, which was passed.

Cross-examined by Wm. M. Randolph, counsel for plaintiff:

The collection of city taxes for the year 1872 commenced about
322 October 1st, but the collections would not be large until December, 1872. The ordinance fixing the rate of taxation for 1872 was passed before the resolution was passed setting apart three-tenths of one per cent. to pay J. and M. Loudon's judgment. I suppose that in fixing the rate of taxation for 1873, the judgments in favor of J. and M. Loudon (one of which at that time was held by Mr. P. C. Bethell) were included in the estimates of the amount of money necessary to be raised for that year. I suppose that the payments made to J. and M. Loudon on their judgments in December, 1873, may have been made out of the taxes for 1873. I think that but for the epidemic of 1873 all or most of these judgments would have been paid off before the expiration of my term of office in January, 1874.

And further this deponent saith not.

JOHN JOHNSON.

323 Subscribed and sworn to before me this eighth day of May, 1878.

S. S. GARRETT,
Special Examiner.

UNITED STATES OF AMERICA,
Western District of Tennessee:

I, S. S. Garrett, special examiner to whom this cause was referred by consent of parties complainant and defendant by their counsel respectively, which said agreement to take testimony in this cause is filed in this cause and signed by said counsel, do hereby certify that on the day named in this deposition I was attended at my office in the city of Memphis and State of Tennessee by the counsel and witness aforesaid; that the said witness was duly sworn and examined, and the deposition was reduced to writing and read to the witness, and by him subscribed in my presence.

In witness whereof I have heretofore set my hand this eighth day of May, A. D. 1878.

S. S. GARRETT,
Special Examiner.

324 Examiner's fees, one per diem, $3.00.

(Endorsed:) No. 243. Circuit court of the United States, western district of Tennessee. J. and M. Loudon vs. The City of Memphis. Deposition of John Johnson for defendants. Filed May 10, 1878. H. E. Andrews, clerk. L. H. Pillsbury, D. C. S. P. Walker, esq., for the city.

325 In the circuit court of the United States for the district of West Tennessee. In equity.

JAMES A. LOUDON
v.
THE CITY OF MEMPHIS. } No. 243.

The plaintiff comes and for replication to the answer herein filed by the defendant says that his bill herein filed is true, certain and sufficient, and that the allegations and statements of the said answer in contradiction of or inconsistent with the allegations and statements of the said bill are untrue, uncertain, and insufficient. And all this the plaintiff is ready and willing and hereby offers to maintain and prove in such manner and form and by such evidence as may be according to law and to the practice of the court.

RANDOLPH, HAMMOND, AND WASSELL,
Sol's for Pl'ff.

326 (Endorsed:) No. 243. Eq. Circuit court of the United States, western district of Tennessee. J. A. Loudon vs. The City of Memphis. Replication to answer. Filed May 17, 1878. H. E. Andrews, clerk, by L. H. Pillsbury, D. C. Randolph, Hammond, and Wassell.

327 Articles of agreement made and concluded this third day of November, 1868, between the mayor and aldermen of the city of Memphis, county of Shelby, State of Tennessee, of the first part, and J. and M. Loudon of the 2nd part, whereby it is covenanted and agreed as follows, to wit:

That for and in consideration of the payment hereinafter specified to be made by the party of the first part, the said J. and M. Loudon, contractors, hereby agree to execute in a thorough and workmanlike manner under the direction of the city engineer, as limited by the specifications hereunto attached, and which are hereby made a part of this contract, the following work, to wit:

To pave with stone an area 60 f't wide adjoining the upper edge of the wharf and extending from Court st. on the north to Union st. on the south, and furnish all the material for the same.

Said work shall be commenced on or before the ninth day of
328 November, 1868, and shall be completed on or before the nineteenth day of January, 1869.

It is understood that this contract is entered into subject to the right of the engineer or mayor and improvement committee to make such changes from time to time during the progress of the work, either in addition thereto or deduction therefrom, as may be deemed expedient, the value of such changes to be in the same ratio as that for the work

first agreed upon under this contract, or deducted therefrom as the case may be, and such changes shall in no case vacate or render void any of the conditions of this contract, and furthermore no changes shall be made in the work or paid for except by a written order of the engineer. It is further understood that for each and every day's delay in the performance of this contract, from and after the time hereinbefore specified for its completion, the sum of twenty dollars shall be paid by the
329 said party of the second part to the said party of the first part as a penalty for nonfulfillment of the contract as to time and as liquidated damages for such delay.

It is further understood that this contract is entered into subject to the right of the engineer or the mayor and improvement committee to suspend the above work for any failure on the part of the contractor, and such suspension shall not effect the right of the city to damages incident to such failure.

For and in consideration of the faithful execution of all the work as aforesaid, and the fulfillment of all the provisions of this contract by the said party of the second part, the said mayor and aldermen hereby agree to pay or cause to be paid to said J. and M. Loudon, their heirs, executors, administrators, or assignees, the following price, to wit, three dollars and seventy cents per square yard of pavement.

Payments to be made in notes of the city due twelve months
330 after date and without interest on estimates amounting to six thousand dollars or more.

SPECIFICATIONS, &C.

In witness whereof the parties to these presents have hereunto set their hands and seals the year and day first above written, and to a duplicate instrument of like tenor and date.

J. AND M. LOUDON.
JNO. W. LEFTWICH, *Mayor.*

Attest:
L. R. RICHARDS,
City Register.

(Endorsed:) Eq. No. 243. U. S. circ't c't, W. D. Tenn. James A. Loudon vs. City of Memphis. Copy of contract for paving wharf. Filed May 18, 1878. H. E. Andrews, clerk.

331 *Declaration.*

No. 2127. In the United States circuit court for the western district of Tennessee, May term, 1876.

Pinkney C. Bethell, who is a citizen of the State of Louisiana, the plaintiff in this suit, by attorney complains of the City of Memphis, a municipal corporation and a citizen of the State of Tennessee, the defendant herein, of a plea of debt.

For that on the 4th day of November, 1871, by the consideration and judgment of the first circuit court of Shelby County, Tennessee, James A. Loudon and Milton B. Loudon, then partners by the style of J. and M. Loudon, recovered of the defendant the sum of thirty-two thousand and eighty-four dollars and eighty-seven cents ($32,084.87) for a balance due them from the defendant for stone pavement laid down by them at the request of the defendant in its public streets and alleys un-

332 der contracts in writing made under an act of the legislature and ordinances of the defendant purporting to require that the cost of constructing the said pavement be borne and paid by the owners of the property abutting the streets and alleys on which the pavement was laid down, in proportion to the fronts of their respective lots on the said streets and alleys, to the said J. and M. Loudon, which contracts, so far as they attempted to charge the cost of the said pavement upon the said abutting lots, had before the said 4th day of November, 1871, been declared void by the supreme court of the State of Tennessee, and the further sum of thirty-one dollars and seventy-five cents ($31.75) the costs of the suit for which execution was ordered to issue.

A duly certified copy of the said judgment, which now remains in
333 full force and in no wise set aside, vacated, appealed from, or reversed, is here to the court shown. And for that also the said J. M. Loudon after the rendition of the said judgment, to wit, on the day of 187 , for value received, assigned and transferred the said judgment and all their rights thereunder to the plaintiff. The said assignment is also now to the court here shown. And the plaintiff in fact says that the said judgment has never been paid either to the plaintiff or to the said J. and M. Loudon, but the whole thereof besides interest remains unpaid and due to the plaintiff, to his damage fifteen thousand dollars.

RANDOLPH, HAMMOND & JORDAN,
Attorneys for Plaintiffs.

(Endorsed:) No. 2127. Circuit court of the United States, western district of Tennessee. Pinkney C. Bethell vs. City of Memphis. Debt. Declaration. Filed Mar. 9, 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C. Randolph, H. & J., for pl't'ffs.

334 The President of the United States of America to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to summon the City of Memphis, citizen of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States in the sixth circuit for the western district of Tennessee, at Memphis, in said district, on the fourth Monday in May next, and then and there to answer Pinkney C. Bethell, a citizen of the State of Louisiana, in a plea of debt to the damage of the said plaintiff (as he says) of fifteen thousand dollars.

Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at said Memphis, this 9th day of March, A. D. 1876, and the 100 of American Independence.

[L. S.]

H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

Know all men by these presents, that we, Pinkney C. Bethell and W. M. Sneed, are held and firmly bound unto said defendant, the City of Memphis, in the sum of two hundred and fifty dollars; but to be void on condition that the plaintiff do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendant; and also on failure of the said plaintiff to prosecute his said suit

with effect; and also on failure of the defendant, if convicted, to pay said costs.

Witness our hands and seals this 9th day of March, A. D. 1876.

P. C. BETHELL, [SEAL.]
By WM. M. RANDOLPH, *Att'y.* [SEAL.]
W. M. SNEED, *Surety.* [SEAL.]

Approved by and acknowledged before me the 9th day of March, A. D. 1876.

H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

335 (Endorsed:) No. 2127. Circuit court of the United States, western district of Tennessee. P. C. Bethell vs. City of Memphis. Summons. Returnable to May term, A. D. 1876. Randolph, Hammond and Jordan, attorneys. Returned 13' day of March, A. D. 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C.

On the 10' day of March, 1876, at Memphis, Tenn., I personally served true copy hereof upon S. P. Walker, as city attorney of the city of Memphis, and at same time left in his hands a certified copy of the declaration in this case, and on said date I personally served true copy hereof on John R. Flippin, as mayor of the city of Memphis.

L. B. EATON,
U. S. Marshal.

Sum., 2 serv., 4.00; dec., 1 serv., 2.00; 2 m., 0.12—$6.12.

336 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1876, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 22d day of June, A. D. 1876, in the following cause, to wit:

PINKNEY C. BETHELL, PLAINTIFF,
vs.
CITY OF MEMPHIS, DEFENDANT. } No. 2127.

The plaintiff appeared by attorney, and the defendant, though duly served with process within the time prescribed by law, has not put in any defence, but has failed to appear. And thereupon, it appearing to the court that the plaintiff's suit is based upon a judgment rendered by the first circuit court of Shelby County, Tennessee, on the 4th day of November, 1871, in favor of James M. Loudon against The City
337 of Memphis for the sum of thirty-two thousand and eighty-four dollars and eighty-seven cents ($32,084.87), and thirty-one dollars and seventy cents ($31.75) costs, and that the said judgment has been duly assigned to the plaintiff, and that the balance of the principal and interest remaining due upon the said judgment, after allowing all payments, amounts to the sum of twenty-nine thousand six hundred and ninety-eight dollars and seventy-six cents ($29,698.76), it is therefore

considered and adjudged that the plaintiff, Pinkney C. Bethell, do have and recover of and from the defendant, the City of Memphis, the said sum of twenty-nine thousand six hundred and ninety-eight dollars and seventy-six cents ($29,698.76) and all the costs of this suit, and that execution issue therefor.

338 UNITED STATES OF AMERICA,
District of West Tennessee:

The President of the United States to the marshal of said district, greeting:

You are hereby commanded that of the goods and chattels, lands and tenements of the city of Memphis (if to be found in your district) you cause to be made the sum of twenty-nine thousand seven hundred and thirty dollars and 51 cents, together with twenty-seven dollars and 02 cents costs, the fees hereon endorsed, which P. C. Bethell lately, in the circuit court of the United States for the district aforesaid, at May term, 1876, recovered against it for debt, damages, and costs, whereof the said defendant was convicted, as appears to us of record, and have you these moneys, with interest until paid, ready to render before the judge of said court, at a court to be holden at the court-house in the city of Memphis, on the fourth Monday in November, 1876, to the said plaintiff for his debt, damages, and costs.

Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and seal of said circuit court the 7th day in July, 1876.

[L. S.]

H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

Judg't the 22d day of June, 1876		$29,730 51
(Of above judg't 31.75 was for costs in cir. ct.)		
Docket fee	$10 00	
Clerk's fees	10 90	
Marshal's fees	6 12	
Commissioner's fees		
Clerk's additional		
Marshal's		27 02

339 (Endorsed:) No. 2127. Circuit court of the United States, western district of Tennessee, May term, 1876. P. C. Bethell vs. City of Memphis. Fieri facias. Issued 7th day of July, 1876. Judg't 22' day of June, 1876, $29,730.51, costs 27.02. Ret'd and filed Aug. 25th, 1876. H. E. Andrews, clerk.

Came to hand 7th day of July, 1876, and after diligent search no property of the defendant to be found in my district subject to levy.
July 7, '76.

L. B. EATON.
U. S. M.

Randolph, H. and J., attorneys for plaintiff. Ret'd and filed July 8th, 1876. H. E Andrews, clerk.

340 *Petition for mandamus.*

CASE No. 2222.

In the circuit court of the United States for the western district of Tennessee.

Pinkney C. Bethell, who is a citizen of the State of Louisiana, by this petition states that on the 22d day of June, 1876, by the consideration and judgment of the circuit court of the United States for the western district of Tennessee, in a suit then therein pending, he recovered of the City of Memphis, a municipal corporation and a citizen of the State of Tennessee, the sum of twenty-nine thousand seven hundred and thirty dollars and fifty-one cents ($29,730.51), and the further sum of twenty-seven and $\frac{02}{100}$ dollars ($27.02), the costs of the suit, for which execution was ordered to issue. An execution has since issued on the said judgment, and has come to the hands of the marshal of the United States for the western district of Tennessee, and the same has been re-
341 turned by him with the return thereon endorsed that after diligent search no property of the defendant is to be found in his district subject to levy for the satisfaction thereof.

And the said judgment remains in full force, and in no wise set aside, paid or reversed.

Petitioner shows further that the indebtedness on which the said judgment is based accrued as follows: The firm of J. and M. Loudon entered into contracts with the city of Memphis for paving with stone certain of the streets and alleys of the city of Memphis, the city undertaking to charge and collect the cost of constructing the pavement upon or from the owners of the property adjoining the streets and alleys paved, in proportion to the fronts of their respective lots on the said streets and alleys, and to pay over the same to the said J. and M. Loudon, and accepted by the city. After the said paving had been
342 laid down, and before it had been paid for, and before March, 1873, the supreme court of the State of Tennessee decided and declared that the city of Memphis had no right to make the levy and assessments of the cost of the said pavement upon the abutting property, and that its attempt to do so was void. Before the said decision, the said J. and M. Loudon had brought a suit in the circuit court of Shelby County, Tennessee, against the city of Memphis on its guaranty contained in the contracts aforesaid, of the payment to the said J. and M. Loudon of the sums that might become due them for paving laid down by them under the said contracts. In the said suit the said J. M. Loudon, on the 4th day of November, 1871, in the said State circuit court recovered of the city of Memphis the sum of thirty-two thousand and eighty-four dollars and eighty-seven cents ($32,084.87) and
343 thirty-one dollars and seventy-five cents ($31.75), the costs of the suit, for which execution was awarded. On the 18th day of March, 1873, and while the said judgment was so in force, the general assembly of the State of Tennessee passed an act, which was afterwards approved by the governor, providing that where any incorporated city had by virtue of presumed authority to lay special assessments for specific purposes levied and collected taxes or special assessments, the right to make which levy and assessment was afterwards declared void by the supreme court of the State, such city should have the power to levy a tax in addition to all other taxes allowed by law to be levied, sufficient to cover the entire cost of the improvement, with interest thereon, for

which the said special assessments were illegally made. After the
344 said act had so been passed, and while it was in force, to wit, on the day of , 1874, the said J. and M. Loudon assigned and transferred the said judgment to the petitioner, who thereby became vested with the same right thereto and the same right to enforce the payment thereof that had previously belonged to the said J. and M. Loudon. Afterwards petitioner brought his suit on the said judgment in this court, and recovered therein the judgment hereinbefore recited, the same being for the amount of the said judgment in the said State court, including interest, less the payments that had previously been made. For more certainty and particularity petitioner refers to the record of the suit in this court in which the said judgment was recovered. Petitioner states and submits that the city of Memphis,
345 under the act of March, 1873, as well as other laws, has express and ample power to levy and collect a tax for the payment of the said judgment, and that it is its imperative duty to do so. But though repeated express demands have been made for the payment of the said judgment, or the debt on which it is based, or the levy of a tax for its payment, the city of Memphis has not paid the same, nor provided the means for its payment, nor levied a tax for the purpose. On the contrary, as petitioner is informed and believes, and charges, at its instance the legislature of the State of Tennessee, with a view to prevent altogether the forcible collection of the said debt, in the year 1875, passed an act purporting to repeal the said act of March, 1873, giving
346 the power to levy the said tax. Petitioner is informed and believes, and charges, that the said pretended repeal of the said act as to him, and so far as it may hinder, delay or impede the collection of his said debt, or the levy of a tax for its payment, is unconstitutional and void. Wherefore petitioner prays that an alternative writ of mandamus issue requiring the city of Memphis to proceed at its next levy of taxes to levy a tax, in addition to all other taxes allowed by law to be levied, sufficient in amount to pay the judgment aforesaid of the plaintiff, and the interest that may accrue thereon, on all the taxable property in the city of Memphis, and to collect the same as prescribed by law, and to pay over the sums collected to the petitioner from time to time as
347 collected towards the satisfaction of the said judgment, until the entire judgment shall be paid, or appear in court here on the 15th day of September, 1876, and show cause, if any there is, to the contrary; and that petitioner may have all other just, proper, and necessary relief, &c.

RANDOLPH, HAMMOND & JORDAN,
For Petitioner.

William M. Sneed, as agent of Pinckney C. Bethell, who is absent from the State of Tennessee, makes oath that the statements in the foregoing petition are true to the best of his knowledge, information and belief.

W. M. SNEED.

Subscribed and sworn to before me this 15th day of July, 1876.

L. H. PILLSBURY,
Deputy Clerk U. S. Court.

The clerk of the circuit court of the United States for the
348 western district of Tennessee, upon the filing of the foregoing

petition and the giving the proper bond for cost, will issue the alternative writ of mandamus as therein prayed for.

Given under my hand at chambers, this 9th day of August, 1876.

CONNALLY F. TRIGG,
Judge, &c.

(Endorsed:) No. 2222. Circuit court of the United States, western district of Tennessee. P. C. Bethell vs. City of Memphis. Petition for mandamus. Filed Aug. 15th, 1876. H. E. Andrews, clerk.

349 Know all men by these presents that we, P. C. Bethell *and and* held and firmly bound unto said defendant in the sum of two hundred and fifty dollars, but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendant; and also on failure of the said plaintiff to prosecute the said suit with effect; and also on failure of the defendant, if convicted, to pay said costs.

Witness our hands and and seals this 15th day of Aug., A. D. 1876.

P. C. BETHELL, [SEAL.]
By WM. M. RANDOLPH, *Att'y.*

Approved by and acknowledged before me, as to Randolph, the 15th day of August, A. D. 1876.

H. E. ANDREWS,
Clerk.

350 (Endorsed:) No. 2222. P. C. Bethell vs. City of Memphis. Bond. Randolph, H. and J., attorneys. Filed 15 day of Aug., A. D. 1876. H. E. Andrews, clerk.

351 UNITED STATES OF AMERICA,
Western District of Tennessee, ss:

The President of the United States of America to the City of Memphis, John R. Flippin, mayor of the city of Memphis, and the general council of the city of Memphis:

Whereas it appears from the petition of Pinkney C. Bethell, a citizen of the State of Louisiana, filed herein, that on the 22d day of June, 1876, by the judgment of the United States circuit court for the western district of Tennessee, in a suit then therein pending, he recovered of the city of Memphis, a municipal corporation of the State of Tennessee and a citizen of the State of Tennessee, the sum of twenty-nine thousand seven hundred and thirty and one-half dollars ($29,730.50), and the further sum of twenty-seven dollars and two cents ($27.02), costs of the suit,
352 for which execution was ordered to issue. An execution has since issued on the said judgment, and has come to the United States marshal for the western district of Tennessee, and the same has been returned by him with the return thereon endorsed, that after diligent search no property of defendant is to be found in his district subject to levy for the satisfaction thereof, and the said judgment remains in full force and in no wise set aside, paid, or reversed. The indebtedness on which the said judgment is based accrued as follows: The firm of J. and M. Loudon entered into contracts with the City of Memphis for paving with stone certain streets and alleys of the city, the city undertaking to charge and collect the cost of constructing the pavement upon

or from the owners of the property abutting the streets and
353 alleys so paved, and to pay over the same to the said J. and M. Loudon in certain specified installments. The pavement was laid down by the said J. and M. Loudon and accepted by the city. After the said paving had been laid down, and before it had been paid for, and before March, 1873, the supreme court of the State of Tennessee decided and declared that the city of Memphis had no right to make the levy and assessment of the cost of the pavement upon the abutting property, and that its attempt to do so was void. Before the said decision, the said J. and M. Loudon had brought a suit in the circuit court of Shelby County, Tennessee, against the city of Memphis on its guaranty contained in the contracts aforesaid, of the payment to the said J.
354 and M. Loudon of the sums that might become due them for paving laid down by them under the said contracts. In the said suit the said J. and M. Loudon, on the 4th day of November, 1871, in the said circuit court, recovered of the city of Memphis the sum of thirty-two thousand and eighty-four dollars and eighty-seven cents ($32,084.87), and thirty-one dollars and seventy-five cents ($31.75), the costs of the suit, for which execution was ordered to issue. On the 18th day of March, 1873, and while the said judgment was so in force, the general assembly of the State of Tennessee passed an act, which was afterwards approved by the governor, providing that when any incorporated city had by presumed authority to lay special assessments for specific purposes levied
355 and collected taxes or special assessments, the right to make which levy and assessments was declared void by the supreme court of the State, such city should have the power to levy a tax in addition to all other taxes allowed by law to be levied, sufficient to cover the entire cost of the improvement, with interest thereon, for which the special assessments were illegally made. After the said act had so been passed and while it was in force, to wit, on the day of 1874, the said J. and M. Loudon assigned and transferred the said judgment to the petitioner, who thereby became vested with the same right thereto and the same right to enforce the payment thereof that had previously belonged to the said J. and M. Loudon. Afterwards petitioner brought his suit on the said judgment in this
356 court and recovered therein the judgment before recited, the same being for the amount of the said judgment in the said State circuit court, including interest, less the payments that had previously been made. And it further appearing that the city of Memphis has no property subject to execution at law, out of which the said judgment or any part thereof can be made by process of law, and that the city of Memphis has altogether failed and neglected to make payment, or provide the means for making payment of the said judgment, and Hon. Connally F. Trigg, judge of the United States district court for the western district of Tennessee, having made an order that an alternative mandamus be issued requiring you, the said City of Memphis,
357 John R. Flippin, mayor, and the general council, to pay the petitioner the said sum due him on the said judgment, or proceed at the next levy of taxes, to levy a tax in addition to all other taxes allowed by law to be levied on all taxable property assessed for taxation in the city of Memphis, sufficient in amount to pay said judgment and the interest thereon, and to collect the same as prescribed by law, and to pay over the sums collected to the petitioner, from time to time, as collected, towards the satisfaction of the said judgment, until the entire judgment shall be paid, or appear in court here on the 15th day of September, 1876, and show cause, if any there is, to the contrary

You are therefore notified and required in default of immediate
358 judgment in full of such judgment, interest, and cost, to proceed at the next levy of taxes to levy a tax in addition to all other taxes allowed by law to be levied on all the taxable property assessed for taxation by the city of Memphis, sufficient in amount after paying the costs of collection, and after making the proper allowance for errors and insolvencies, to pay the amount due on the said judgment, including interest and costs, and to cause the same to be collected in the manner prescribed by law, and the amounts collected that you pay over to the petitioner towards the satisfaction of his said judgment, from time to time as received, until the entire balance due shall be paid, or appear before the judge of the United States circuit court for the western district of Tennessee in court here, on the 15th day of Sep-
359 tember, 1876, and show cause, if any you have, why you do not do so.

Herein fail not and have you then and there this writ, and a return of the manner in which you have executed the same.

Witness Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court at Memphis, this 15' day of August, 1876.

[L. S.] H. E. ANDREWS, *Clerk.*

(Endorsed:) No. 2222. Circuit court of the United States, western district of Tennessee. P. C. Bethell vs. City of Memphis. Mandamus ret'd and filed Sep. 12th, 1876 H. E. Andrews, clerk, L. H. Pillsbury, D. C.

I, Horace E. Andrews, clerk of the U. S. circuit court for the
360 western district of Tennessee, do hereby certify that the foregoing is a true and complete copy of the original mandamus as the same appears of record and on the files in said court.

Witness my signature and seal of said court this 15th day of August, 1876.

[L. S.] H. E. ANDREWS, *Clerk.*

On 11th day of Sept'r, 1876, I served the board of alderman and the board of common council, together constituting the general council of the city of Memphis, by reading the contents of original writ of alt. mandamus to each of said boards, while same were in legal session, and on same date served said original writ of alt. mandamus personally on R. C. Williamson, as acting mayor of city of Memphis.

3 serv., 6.00; 2 m., 0.12—6.12.

L. B. EATON,
U. S. Marshal.

361 *Petition for mandamus.*

In the circuit court of the United States for the western district of Tennessee.

P. C. BETHELL
vs.
THE CITY OF MEMPHIS. } No. 2222. Law docket.

And now comes the said defendant, by attorney, and demurs to the petition for mandamus, filed in the above entitled cause, and moves that the alternative writ therein issued be quashed. For cause of demurrer

and motion, defendant says: It doth not appear on the face of said petition that this defendant hath any power or is under any duty of levying the tax as prayed for in the petition. Wherefore defendant prays judgment, &c.

S. P. WALKER,
Att'y for Defendant.

362 (Endorsed:) 2222. P. C. Bethell vs. City of Memphis, demurrer. Filed Sept. 20th, 1876. H. E. Andrews, clerk. L. H. Pillsbury, D. C. S. P. Walker.

Return.

Circuit court of the United States for western district of Tennessee

P. C. BETHELL
vs.
THE CITY OF MEMPHIS. } No. 2222. Law docket.

And now comes the defendant the City of Memphis, and for return to the alternative writ of mandamus, heretofore issued in this cause, it states that it has not obeyed the commands of the said writ, and
363 assigns the follows causes as reasons for not having obeyed the same to wit:

1. By the 81st section of the act of the legislature of the State of Tennessee passed March 23d, 1875, and entitled "An act to regulate and organize municipal corporations of certain population, and for the increase and diminution of their powers;" the act passed March 18th, 1873, and referred to in relator's petition, was repealed. Said act of March 18th, 1873, was enacted long after the execution of said contracts for paving between the relator and City of Memphis were entered into and performed by relator, and after judgments for the balance due him had been recovered in the circuit court of Shelby County, as stated in the petition. The act of March 18th, 1873, therefore was not part of plaintiff's contracts, and the legislature had power to repeal the same at pleasure.

2. Except as provided in said act of March 18th, 1873, and for
364 cases falling within the terms of said act, the taxing powers of the defendant with certain designated and special exceptions (the relator's case not falling within said exceptions) is limited to an annual tax of one per cent., or one dollar on every one hundred dollars of taxable property. By the act of February 13th, 1854, entitled "An act to amend the charter of the city of Memphis," and being chapter 195 of the acts of 1853–'54, it was enacted that "the board of mayor and aldermen shall have power to lay and collect taxes for the purpose of defraying expenses necessarily incurred in administering the affairs of the city, but the tax for that purpose shall never exceed one per centum, or one dollar on every hundred dollars' worth of property within the city limits liable to taxation and valued at cash prices."

This provision remained in force until it was literally re-enacted
365 by the 55th section of the act of December 1st, 1869, entitled "An act to reduce the charter of the city of Memphis, and the several acts amendatory thereof, into one act," and to revise the same, being chapter 26 of the acts of 1869 and '70, and this latter act remained in force until the passage of said act of March 23d, 1875.

This last act, from section 33 to its close, applies to the city of Mem-

phis, said city having a population of over 35,000 inhabitants by the Federal census of 1870. By the 63d section of said act, it is enacted that said city shall not "assess, levy, or collect a greater rate of taxes than one dollar and sixty cents on each one hundred dollars' worth of taxable property in such city for any and all purposes." By the 64th section it is enacted that of the one dollar and sixty cents permitted to be levied by the 63d section, "not more than one dollar or one
366 per cent. shall be appropriated to defraying general expenses," such as "police and fire departments, officers' salaries, water, lights, improving and repairing streets, &c., and not more than 60 cents shall be appropriated to special purposes; of this amount 20 cents shall be appropriated to the payment of interest on the bonded debt; 25 cents shall be appropriated to providing a sinking fund to retire the bonded indebtedness; ten cents shall be appropriated to the maintenance of the city schools, and five cents to the payment of judgments." The limit, therefore, upon said city's power of taxation, as fixed by said section 63 of the said act of March 23d, 1873, was but the re-enactment of a law in force continuously from 1854 to that time, and in force during all the period of the execution and performance of said paving contracts,
367 except as the same was affected by said repealed act of March 18, 1873. It would be illegal, therefore, for defendant to levy a special tax in addition to all other taxes allowed by law to pay relator's judgment as commanded by the alternative writ. Defendant cannot exceed the limit prescribed by the said act of March 23d, 1875.

It is not true that said J. and M. Loudon brought suit in the circuit court of Shelby County against the defendant on its guaranty of the payment of the sums that might become due to them for paving laid down by them under the said contracts; nor was the judgment on which this proceeding is based recovered on that guaranty. The truth is that in the year 1867, as stated in the petition, said J. and M. Loudon entered into contracts with the city of Memphis by which they undertook
368 to pave certain streets and alleys, among them Front street and the public landing and wharf, with trap blocks or stone. By the terms of said contract all pavement laid in front of private property was to be paid for to the center of the street by the owner of such abutting property, under special assessments, laid according to the frontage of the property on the street or alley so paved, and the city guaranteed the payment by such owners of said special assessment. As to the west half of Front street, all the public wharf or landing, and all intersections of streets or alleys, there was no abutting private property, and for the pavement to be laid thereon the city agreed to pay primarily, and in the first instance, by notes to be executed at the com-
369 pletion of each section of the work, and payable 12 months after date. The judgments upon which this petition is based were recovered upon notes executed as aforesaid, in payment of the pavement laid upon intersections of streets and alleys, the west half of Front street, and the public landing. In so far as defendant was ever liable upon its guaranty of payment by the owners of abutting property, the same was settled and paid by defendant without suit. Inasmuch, therefore, as the sums due to relator upon which his said judgments were recovered were not due for the cost of an improvement for which had been made special assessments afterwards declared illegal and void by the supreme court of the State, the relator's case is not within the terms of said act of March 18th, 1873. No special assessments
370 were ever made or contemplated to pay for the pavements for which said notes were executed. The same was agreed to be

paid primarily by the city, and necessarily was to be paid with money to be derived by a general tax.

4. As stated in relator's petition, the judgment in this court upon which said petition is based was recovered on judgments rendered in favor of J. and M. Loudon by the first circuit court of Shelby County. Said judgments of the circuit court of Shelby County having been assigned to relator, he, on the day of , 18 , filed his petition in the first circuit court of Shelby County for mandamus against this defendant, by which he sought to compel this defendant to levy a special tax, in addition to all other taxes, sufficient to pay said judgment.

371 An alternative writ issued as prayed for, a return thereto was filed by defendant, a demurrer and replication to the return was filed by the relator, and upon the issues of law and fact thus made the said cause was heard by said circuit court and determined in favor of this defendant. From this judgment relator prosecuted an appeal in the nature of a writ of error, according to the practice of the State court, to the supreme court of the State, and the judgment of said circuit court was there affirmed and the relator's petition was dismissed.

Defendant here makes profert of the record of said cause, a full and true transcript whereof is filed with and as a part of this return, marked Exhibit A to return of defendant, and avers that the parties there-

372 to were the same as the parties to this cause, and that the issues and subject-matter of the litigation were the same as in this cause.

Wherefore defendant pleads and relies upon the records and judgment in said cause as a bar to the relief here sought by relator.

For these reasons defendant has not obeyed said writ, and prays to be hence discharged.

CITY OF MEMPHIS,
By S. P. WALKER,
City Att'y.

(Endorsed:) 2222. Law docket. United States circuit court, western district of Tennessee. P. C. Bethell vs. The City of Memphis. Return filed February 28th, 1877. H. E. Andrews, clerk. S. P. Walker.

373 In the circuit court of the United States for the western district of Tennessee.

PINCKNEY C. BETHELL
vs.
THE CITY OF MEMPHIS.

The plaintiff comes and demurs to the answer or return herein filed on the part of the defendant, because:

(1.) The repeal of the act of 18th March, 1873, was not intended to affect, and did not affect, the right of the plaintiff to have the tax thereby authorized levied for the payment of his debt, now evidenced by the judgment of this court.

(2.) The city had and still has ample authority to levy a tax sufficient for the payment of the plaintiff's judgment, independent of as well as under and by virtue of the said act of 18th March, 1873.

374 (3.) The limitations on the city's power of taxation contained in the acts of the legislature referred to in the return or answer of the city do not apply to taxation for extraordinary or discretionary purposes, such as taxation to pay a debt for paving the streets and alleys

with stone by special contracts made under specific authority conferred by a special act of the legislature.

(4.) The act of the 23d March, 1875, so far as it undertook to repeal the act of 18th March, 1873, and so far as such repeal may affect the right of the plaintiff to have a tax levied to pay his judgment, and so far as such act of 23d March, 1875, otherwise impairs the right of the plaintiff to have a tax levied sufficient to pay his judgment is unconstitutional and void.

(5.) The plaintiff's judgment of the supreme court of Tennessee,
375 affirming the judgment of the circuit court of Shelby County, mentioned in the return, is no bar or estoppal to the plaintiff in this suit, inasmuch as the said judgment was in a suit involving a subject matter totally distinct and different from the subject matter of this present suit; the said former suit was to compel the levy of a tax to pay a judgment of the circuit court of Shelby County, while this suit is to compel the levy of a tax to pay a judgment of this court.

(6.) No sufficient reasons are shown why the city does not proceed to levy the tax the alternative writ commands it to levy.

And for replication to the part of the return not answered by the foregoing demurrer, the plaintiff says that the debt for which the judgment recited in the alternative writ of mandamus was recovered
376 accrued in the manner stated in the said alternative writ and in the petition on which the said writ is based, and not in the manner set out in the said return; and that the defendant is estopped by the allegations in the declaration in the suit in which the judgment recited in the said alternative writ and the said petition was recovered, and by the said judgment from denying the truth of the statements of the said petition and alternative writ as to the manner in which the said debt accrued, and the plaintiff here pleads and relies upon the record in the said suit as such estoppel. Wherefore, &c.

RANDOLPH, HAMMOND & JORDON,
For Plaintiff.

(Endorsed:) No. 2222. Circuit court of the United States, west-
377 ern district of Tennessee. P. C. Bethell v. City of Memphis. Demurrer and replication to return. Filed Jan. 11th, 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C. Randolph, Hammond, and Jordan.

378 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1877, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 20th day of February, A. D. 1878, in the following cause, to wit:

PINKNEY C. BETHELL, PLAINTIFF,
vs.
THE CITY OF MEMPHIS, DEFENDANT. } No. 2222.

This cause was this day heard on the demurrer of the plaintiff to a part of the return of the defendant to the alternative writ of mandamus herein issued, and the replication to the part of the return not demurred

to, and the record and proceedings in this cause, and the record and proceedings in the cause wherein the plaintiff recovered of the de-
379 fendant the judgment recited in the said original writ, and it appearing to the court that the return of the defendant shows no sufficient ground for its refusal to comply with the requirement of the alternative writ of mandamus, and that the command of the said writ ought to be obeyed, it is ordered that the same be made peremptory and final. And it further appearing that on the 22d June, 1876, the plaintiff recovered in this court of the defendant the sum of twenty-nine thousand seven hundred and thirty dollars and fifty-one cents ($29,730.51) and the further sum of twenty-seven dollars and two cents, the costs of the suit, for which execution was ordered to issue; that such execution has since been issued, and has come to the hands of the marshal of the United States for the western district of Tennessee, and has been
380 returned by him with the return thereon endorsed that the defendant has no property subject to levy for the satisfaction thereof; and that the said judgment remains in full force, and in no way set aside, paid, or reversed, and the defendant has no property subject to execution at law out of which the said judgment or any part thereof can be made by process and has altogether failed and neglected to make payment, or provide the means of payment, or to levy any tax for the purpose of making payment of such judgment; and it further appearing to the court that the defendant has by law the power to levy a tax in addition to all other taxes allowed by law to be levied for the purpose
381 of paying and satisfying the said judgment, it is therefore considered, ordered, and adjudged that the defendant and its mayor and general council, through the officers and agencies provided by law, do proceed at its next levy of taxes to levy a tax in addition to all other taxes allowed by law to be levied, on all the property in the city of Memphis, taxable by law, sufficient in amount, after making all proper allowances for errors, insolvencies, and defaults, to pay the judgment aforesaid, including interest accrued and to accrue and the costs of the suit in which the said judgment was recovered, and the costs of this present suit, in which the costs have been taxed at the sum of fifty-four dollars and ninety cents ($54.90) and to collect such tax in the lawful money
382 of the United States, in the manner prescribed by law, and to pay over the sums collected to the plaintiff or his attorneys of record from time to time as collected towards the satisfaction of the said debts, until the entire amount due shall be paid; that a peremptory writ of mandamus do issue, accordingly; and that the same be served as prescribed by law; and that the defendant make return thereof to this court and of the manner in which it has obeyed the same; on or before the first day of the term to be held next after its issuance. It is further ordered that the plaintiff recover of the defendant the costs herein expended and that execution issue therefor.

383 *Transcript of Case No. 2130.*

In the circuit court of the United States for the western district of Tennessee.

James A. Loudon, who is a citizen of the State of Arkansas, the plaintiff herein, by attorney complains of the City of Memphis, a municipal corporation and a citizen of the State of Tennessee, the defendant herein, of a plea of debt.

For that on the 4th day of November, 1871, by the consideration and

judgment of the first circuit court of Shelby County, the said plaintiff and Milton B. Loudon, who has since died, as partners by the style of J. and M. Loudon, recovered of the defendant, the City of Memphis, the sum of eleven thousand dollars, for which execution was awarded;
384 and that also on the said 4th day of November, 1871, by the consideration and judgment of the said first circuit court of Shelby County, the said plaintiff and the said Milton B. Loudon, who has since died, as partners by the style of J. and M. Loudon, recovered of the defendant, the City of Memphis, the further sum of ten thousand dollars, for which also execution was awarded. Duly certified copies of the said two judgments are now here to the court shown. The said two judgments were pronounced for balances due the said firm of J. and M. Loudon, contracted by the defendant, the City of Memphis, for stone pavement laid down by the said J. and M. Loudon, in the public streets and alleys of the city under contracts in writing entered into by and between the said firm of J. and M. Loudon and the city of Mem-
385 phis.

The said contracts so entered into, and the act of the legislature of the State of Tennessee, and the ordinances of the City of Memphis, under and by virtue of which the same were made, attempted and undertook to require that the cost of constructing the said pavement should be borne and paid to the said J. and M. Loudon by the owners of the property abutting the streets and alleys on which the said pavement was so laid down, in proportion to the fronts of their respective lots on the said streets and alleys, as debts contracted by the said owners personally, and in and by the said contracts the defendant, the City of Memphis, guarantied the payment by the said property owners of their respective portions of the said cost of the said pavement, accord-
386 ing to the terms and effect of the said contracts. After the contracts aforesaid were so entered into and before the 18th day of March, 1873, the supreme court of the State of Tennessee, in a suit then pending before it, declared and decreed that the defendant, the City of Memphis, had no right to make the levy and assessment of the said cost of the said pavement upon the said abutting property, or the owners thereof, and that its attempt to do so was void.

The said two judgments so rendered have not been paid, satisfied, set aside, or reversed, but remain in full force, and the money thereby adjudged to be recovered, besides the interest thereon, remains unpaid and due the plaintiff, as surviving partner as aforesaid, by the defend-
387 ant, to the plaintiff's damage ten thousand dollars.

RANDOLPH, HAMMOND, AND JORDON,
Attorneys for Plaintiff.

(Endorsed:) No. 2130. Circuit court of the United States, western district of Tennessee. James A. Loudon vs. The City of Memphis. Debt. Filed Mar. 22d, 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C. Randolph, Hammond, and Jordon, attorneys for plaintiff.

388 The President of the United States of America to the marshal of the western district of Tennessee, greeting:

You are hereby commanded to summon the City of Memphis, a citizen of the State of Tennessee, if to be found within your district, to appear before the judge of the circuit court of the United States, in the sixth circuit for the western district of Tennessee, at Memphis, in said district, on the fourth Monday in May next, and then and there to answer

James A. Loudon, a citizen of the State of Arkansas, in a plea of debt to the damage of the said plaintiffs (as they say) of ten thousand dollars. Herein fail not, and have you then and there this writ.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and the seal of said circuit court, at said Memphis, this 22d day of March, A. D. 1876, and the 100th of American Independence.

[L. S.]

H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

Know all men by these presents, that we, James A. Loudon and Hopkins Loudon, are held and firmly bound unto said defendant, the City of Memphis, in the sum of two hundred and fifty dollars, but to be void on condition that the said plaintiff do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendant; and also on failure of the said plaintiff to prosecute the said suit with effect; and also on failure of the defendant, if convicted, to pay said costs.

Witness our hands and seals this day of M'ch, A. D. 1876.

JAMES A. LOUDON, [SEAL.]
By WM. M. RANDOLPH, *Att'y.*
H. LOUDON. [SEAL.]

Approved by and before me the 22d day of March, A. D. 1876.

H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

389 (Endorsed:) No. 2130. James A. Loudon vs. The City of Memphis. Summons and cost bond. Returned to May term, A. D. 1876. Randolph, H. and J., attorneys. Returned 20th day of April, A. D. 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C. No. 2130. Circuit court of the United States, western district of Tennessee.

On the 22nd March, 1876, I served true copy hereof, together with copy of declaration in this case, on J. R. Flippin, as mayor of the city of Memphis, and on said date I served true copy hereof on S. P. Walker, as attorney of the City of Memphis.

L. B. EATON,
U. S. Marshal.

K.

2 serv. sum., 4.00; 1 serv. dec., 2.00; 2 m., 0.12—6.12.

390 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1876, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 22d day of June, A. D. 1876, in the following cause, to wit:

JAMES A. LOUDON, PLAINTIFF,
vs.
THE CITY OF MEMPHIS, DEFENDANT. } No. 2130. Debt.

The plaintiff appeared by attorney, and the defendant, though duly

served with process within the time prescribed by law, has not put in any defence, but has failed to appear. And thereupon, it appearing to the court that the plaintiff's suit is based upon two several judgments, rendered by the first circuit court of Shelby County, Tennessee,
391 on the 4th day of November, 1871, both in favor of the firm of J. and M. Loudon, of which the plaintiff is surviving member, and against the defendant, one for the sum of eleven thousand dollars ($11,000.00) and one for the sum of ten thousand dollars ($10,000.00), and that the principal and interest remaining due upon said first mentioned judgment, after allowing all payments, amount to-day to five thousand five hundred and thirty-five dollars and eighty cents (5,535.80), and that the principal and interest remaining due upon the said second mentioned judgment, after allowing all payments, amount to-day to five thousand six hundred and twenty-two dollars and seven cents ($5,622.07),

It is therefore considered and adjudged by the court that the plaintiff James A. Loudon do have and recover of and from the defend-
392 ant, the City of Memphis, the sum of eleven thousand one hundred and fifty-seven dollars and eighty-seven cents ($11,157.87), being the aggregate of the said two sums, and all the costs of this suit, and that execution issue therefor.

392½ UNITED STATES OF AMERICA,
District of West Tennessee:

The President of the United States to the marshal of said district, greeting:

You are hereby commanded, that of the goods and chattels, lands and tenements of City of Memphis (if to be found in your district) you cause to be made the sum of eleven thousand one hundred and fifty-seven dollars and 87 cents, together with twenty-six dollars and 92 cents, costs, the fees hereon endorsed, which James A. Loudon, lately in the circuit court of the United States for the district aforesaid, at May term, 1876, recovered against it for debt, damages and costs, whereof the said defendant was convicted, as appears to us of record, and have you these moneys, with interest until paid, ready to render before the judge of said court, at a court to be holden at the court-house in the city of Memphis, on the fourth Monday in November, 1876, to the said plaintiff for his debt, damages and costs.

Herein fail not, and have you then and there this writ.

Witness, the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, and seal of said circuit court, the 7th day in July, 1876.

[L. S.] H. E. ANDREWS, *Clerk*,
L. H. PILLSBURY, *D. C.*

Judgment the 22d day of June, 1876		$11,157 87
Docket fee	$10 00	
Clerk's fees	10 80	
Marshal's fees	6 12	
Commissioner's fees		
Clerk's additional		
Marshal's		26 92

392¾ (Endorsed:) No. 2130. Circuit court of the United States' western district of Tennessee. May term, 1876. Jas. A. Loudon

vs. City of Memphis. Fieri facias. Issued 7th day of July, 1876. Judg't 22d day of June, 1876, $11,157.87. Interest to . Costs, 26.92.

Came to hand 7th day of July, 1876, and after diligent search no property of the defendant to be found in my district subject to levy.

July 7, '76.

L. B. EATON, *U. S. M.*

Ret'd and filed Aug. 25th, 1876. H. E. Andrews, clerk. Randolph, Hammond and Jordan, attorneys for plaintiffs.

393 *Transcript of* ℔ 2224.

In the circuit court of the United States for the western district of Tennessee.

James A. Loudon, who is a citizen of the State of Arkansas, by this his petition states and shows that on the 22d day of June, 1876, by the consideration and judgment of the circuit court of the United States for the western district of Tennessee in a suit then therein pending, he recovered of the City of Memphis, a municipal corporation and a citizen of the State of Tennessee, the sum of eleven thousand one hundred and fifty-seven dollars and eighty-seven cents (11,157.87), and the further sum of twenty-six dollars and ninety-two cents ($26.92), the cost of the suit, for which execution was ordered to issue. An execution has since issued on the said judgment, and has come to the hands of the
394 marshal of the United States for the western district of Tennessee, and the same has been returned by him with the return thereon endorsed that after diligent search no property of the defendant is to be found in his district subject to levy for the satisfaction thereof; and the said judgment remains in full force, and in no wise set aside, paid or reversed. Petitioner shows further that the indebtedness on which the said judgment is based accrued as follows: The firm of J. and M. Loudon, composed of the plaintiff and Milton B. Loudon, who has since died, leaving the plaintiff as surviving partner, entered into contracts with the city of Memphis for paving with stone certain of the streets and alleys of the city of Memphis, the city undertaking to charge and collect the cost of constructing the pave-
395 ment upon or from the owners of the property abutting the streets and alleys paved, in proportion to the fronts of their respective lots on the said streets and alleys, and to pay over the same to the said J. and M. Loudon in certain specified installments. The pavement was laid down by the said J. and M. Loudon and accepted by the city after the said paving had been laid down, and before it had been paid for, and before March, 1873, the supreme court of the State of Tennessee decided and declared that the city of Memphis had no right to make the levy and assessment of the cost of the said pavement upon the abutting property and that its attempt to do so was void. Before the said decision, the said J. and M. Loudon had brought a suit in the circuit court of
396 Shelby County, Tennessee, against the City of Memphis, on its guaranty of the payment to the said J. and M. Loudon of the sums that might become due them for paving laid down by them under the said contracts, contained in the said contracts, and in the said suit, on the 4th day of November, 1871, by the consideration and judgment of the said circuit court, recovered two judgments against the City of Memphis, one for eleven thousand dollars, and one for ten thousand dollars, for which said sums executions were awarded. On the 18th day of March,

1873, and while the two said judgments were in force, the general assembly of the State of Tennessee passed an act, which was afterwards approved by the governor, providing that where any incorporated
397 city had by virtue of presumed authority to lay special assessments for specific purposes levied and collected taxes or special asesssments, the right to make which levy and assessment was afterwards declared void by the supreme court of the State, such city should have the power to levy a tax in addition to all other taxes allowed by law to be levied, sufficient in amount to cover the entire cost of the improvement, with interest thereon, for which said special assessments were illegally made. After the said act had been so passessed the said Milton B. Loudon died, leaving the plaintiff as surviving partner as before stated, who afterwards brought his suit on the said two judgments in this court, and recovered therein the judgment hereinbefore recited, the same being for the amount of the said two judgments in the said State cir-
398 cuit court, including interest, less the pay ments that had previously been made. For more particularity and certainty reference is here made to the record of the suit in this court, in which the said judgment was so recovered. Petitioner states and submits that the City of Memphis, under the act of March, 1873, as well as other laws, has express and ample power to levy and collect a tax for the payment, of the said judgment, and that it is its imperative duty to levy and collect the same. But, though repeated express demands have been made for the payment of the said judgment, or the debt on which it is based, or the levy of a tax for its payment, the City of Memphis has not paid the same, nor provided the means for its payment, nor levied a tax for the pur-
399 pose; on the contrary, as petitioner is informed and believes and charges, at its instance, the legislature of the State of Tennessee, with a view to prevent altogether the compulsory payment of the said debt in the year 1875, passed an act purporting to repeal the said act March, 1873, giving the power to levy the said tax. Petitioner is informed and believes and charges that the said pretended repeal of the said act, as to him, and so far as it may hinder, delay, or impede the collection of his said debt, or the levy of a tax for its payment, is unconstitutional and void. Wherefore petitioner prays that an alternative writ of mandamus issue requiring the City of Memphis to proceed at its next levy of taxes to levy a tax in addition to all other taxes allowed
400 by law to be levied, sufficient in amount, after making allowances for errors, insolvencies, and other proper deductions, to pay the judgment aforesaid of the plaintiff, and the interest that may accrue thereon, on all the taxable property in the City of Memphis, and to collect the same as prescribed by law, and to pay over the sums collected to the petitioner from time to time as collected towards the satisfaction of the said judgment, until the entire judgment shall be paid, or appear in court here on the 15th day ot September, 1876, and show cause, if any there is, to the contrary, that the said alternative writ be made peremptory, and that petitioner may have all other just, proper, and necessary relief

RANDOLPH, HAMMOND & JORDAN.
Att'ys for Petitioner.

401 Hopkins Loudon, as agent of James A. Loudon, who is absent from the State of Tennessee, makes oath that the statements contained in the foregoing petition are true to the best of his knowledge, information, and belief.

H. LOUDON.

Subscribed and sworn to before this 13th day of July, 1876.
L. H. PILLSBURY,
Deputy Clerk U. S. Circuit Court Western Dist. of Tenn.

The clerk of the circuit court of the United States for the western district of Tennessee upon the filing of the foregoing petition and the giving the proper bond for cost will issue the alternative writ of mandamus as therein prayed for.

Given under my hand at chambers this 9th day of August, 1876.
CONNALLY F. TRIGG,
U. S. District Judge, &c.

402 (Endorsed:) No. 2224. Circuit court of the United States, western district of Tennessee. James A. Loudon vs. City of Memphis. Petition for mandamus. Filed Aug. 15, 1876. H. E. Andrews, clerk.

403 Know all men by these presents, that we, James A. Loudon, held and firmly bound unto said defendant in the sum of two hundred and fifty dollars, but to be void on condition that the said defendants do pay and satisfy all costs that may accrue in that behalf in the prosecution of the said suit this day commenced by the said plaintiff in the circuit court of the United States for the western district of Tennessee, at said Memphis, against the said defendant; and also on failure of the said plaintiff to prosecute the said suit with effect; and also on failure of the defendant, if convicted, to pay said costs.

Witness our hands and seals this day of A. D. 187 .
JAS. A. LOUDON, [SEAL.]
By WM. M. RANDOLPH, *Att'y.*

Approved by and acknowledged before me, as to Randolph, the 15th day of Aug., A. D. 1876.
H. E. ANDREWS, *Clerk.*

404 (Endorsed:) No. 2224. Jas. A. Loudon vs. the City of Memphis. Bond. Randolph, H. and J., attorneys. Filed 15th day of August, A. D. 1876. H. E. Andrews, clerk.

405 *Writ.*

UNITED STATES OF AMERICA,
Western District of Tennessee:

The President of the United States to the City of Memphis, John R. Flippin, mayor of the city of Memphis, and the general council of the city of Memphis, greeting:

Whereas it appears from the petition of James A. Loudon, a citizen of the State of Arkansas, filed herein, that on the 22d day of June, 1876, by the consideration and judgment of the circuit court of the United States for the western district of Tennessee, in a suit then therein pending, he recovered of the City of Memphis, a municipal corporation and a citizen of the State of Tennessee, the sum of eleven thousand one hundred and fifty-seven dollars and eighty-seven cents ($11,157.87), and the further sum of twenty-six dollars and ninety-two cents ($26.92), the costs of the suit for which execution was ordered to issue; that
406 an execution has since been issued on the said judgment and has come to the hands of the marshal of the United States for the

western district of Tennessee, and the same has been returned by him with the return thereon endorsed that after diligent search there was no property of the defendant to be found in his district subject to levy for the satisfaction thereof; that the said judgment remains in full force and in no way set aside, paid or reversed; that the indebtedness on which the said judgment is based accrued as follows: The firm of J. and M. Loudon, composed of the plaintiff and Milton B. Loudon, who has since died, leaving the plaintiff as surviving partner, entered into contracts with the City of Memphis for paving certain streets and alleys of the City of Memphis with stone, the city undertaking
407 to charge and collect the cost of constructing the pavement upon or from the owners of the property abutting the streets and alleys paved in proportion to the fronts of their respective lots on the said streets and alleys, and to pay over the same to the said J. and M. Loudon in certain specified installments. The pavement was laid down by the said J. and M. Loudon and accepted by the city. After the said paving had been laid down, and before it had been paid for, and before March, 1873, the supreme court of the State of Tennessee decided and declared that the City of Memphis had no right to make the levy and assessment of the cost of the said pavement upon the abutting property and that its attempt to do so was void. Before the said decision
408 the said J. and M. Loudon had brought a suit in the circuit court of Shelby County, Tennessee, against the City of Memphis on its guaranty of the payment to the said J. and M. Loudon of the sums that might become due them for paving laid down by them under the said contracts contained in the said contracts, and in the said suit, on the 4th day of November, 1871, by the consideration and judgment of the said State circuit court, recovered two judgments against the City of Memphis, one for eleven thousand dollars and one for ten thousand dollars, for which sums execution was awarded. On the 18th day of March, 1873, and while the said judgments were in force, the general assembly of the State of Tennessee passed an act which was afterwards approved by the governor, providing that where any incorporated
409 city had by virtue of presumed authority to lay special assessments for specific purposes levied and collected taxes or special assessments the right to make, which levy and assessment was afterwards declared void by the supreme court of the State, such city should have the power to levy a tax in addition to all other taxes allowed by law to be levied sufficient in amount to cover the entire cost of the improvement with interest thereon, for which said special assessments were illegally made after the said act had been so passed, the said Milton B. Loudon died, leaving the plaintiff as surviving partner as before stated, who afterwards brought his suit on the two said judgments in this court, and recovered therein the judgments hereinbefore stated, the
410 same being for the amount of the said two judgments in the said circuit court, including interest, less the payments that had previously been made, and it further appearing that the City of Memphis has no property subject to execution at law out of which the said judgment or any part thereof can be made by process of law, and that the City of Memphis has altogether failed and neglected to make payment or provide the means for making payment of the said judgment. And Hon. Connally F. Trigg, judge of the United States district court for the western district of Tennessee, having made an order that an alternative mandamus be issued requiring you, the said City of Memphis, John A. Flippin, mayor, and the general council of the said city
411 to pay the petitioner the said sum due him on the said judgments

or proceed at the next levy of taxes to levy a tax in addition to all other taxes allowed by law to be levied on all taxable property assessed for taxation in the City of Memphis sufficient in amount to pay said judgments and the interest thereon, and to collect the same as prescribed by law, and to pay over the sums collected to the petitioner from time to time as collected towards the satisfaction of the said judgment until the entire judgment shall be paid, or appear in court here on the 15th day of September, 1876, and show cause, if any, there is to the contrary.

You are therefore notified and required in default of immediate
412 payment in full of such judgment interest and cost to proceed at the next levy of taxes to levy a tax in addition to all other taxes allowed by law to be levied on all the taxable property assessed for taxation by the City of Memphis, sufficient in amount after paying the costs of collection and after making the proper allowance for error, and insolvencies, to pay the amount due on the said judgment including interest and costs, and to cause the same to be collected in the manner prescribed by law, and the amounts collected that you pay over to the petitioner towards the satisfaction of his said judgment from time to time as received, until the entire balance due shall be paid, or appear before
413 the judge of the United States circuit court for the western district of Tennessee in court here on the 15th day of September, 1876, and show cause if any, you have why you do not do so.

Herein fail not at your peril and have you then and there this writ, and a return of the manner in which you have obeyed the same.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States and the seal of the said circuit court at Memphis this 15th day of August, 1876.

[L. S.] H. E. ANDREWS, *Clerk.*

(Endorsed:) 2224. Circuit court of the United States western district of Tennessee. James A. Loudon vs. The City of Memphis
414 mandamus. Randolph H. and J.

I, Horace E. Andrews, clerk of the circuit court of the United States for the western district of Tennessee, do hereby certify that the foregoing is a true and complete copy of the original mandamus as the same appears of record and on the files of said court.

Witness my signature and seal of said court this 16th day of August, 1876.

[L. S.] H. E. ANDREWS, *Clerk.*

On the 11th day Sept., 1876, I served the board of aldermen and the board of common council, together constituting the general council of the City of Memphis by reading contents of orig. writ of alt., mandamus to each of said boards while same were in legal session, and on same date I served said orig. writ of alt. mandamus on R. C. Williamson as acting mayor of City of Memphis.

L. B. EATON,
K. *U. S. Marshal.*

3 serv. 6.00; 2 miles 0.12—6.12.

Ret'd. Filed Sept. 25, 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C.

415 In the circuit court of the United States for the western district of Tennessee.

JAMES A. LOUDON, *vs.* THE CITY OF MEMPHIS. } Petition for mandamus. No. 2224. Law docket.

And now comes the said defendant by attorney and demurs to the petition for mandamus filed in the above entitled cause, and moves that the alternative writ therein issued be quashed. For cause of demurrer and motion defendant says: it doth appear on the face of said petition that defendant hath any power or is under any duty of levying the tax as prayed for in the petition.

Wherefore defendant prays judgment, &c.

S. P. WALKER,
Att'y for Defendant.

416 (Endorsed:) 2224. James A. Loudon vs. The City o . Demurrer. Filed Sept. 20, 1876. H. E. Andrews, clerk, L. H. Pillsbury, D. C. S. P. Walker.

417 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1876, at the United States court-house, in the City of Memphis, in said district, on to wit, the 24th day of February, A. D. 1877, in the following cause, to wit:

JAMES A. LOUDON, PLAINTIFF, *vs.* CITY OF MEMPHIS, DEFENDANT. } No. 2224.

This cause was this day heard on the demurrer of the defendant to the petition for mandamus and its motion to quash the alternative writ of mandamus herein issued, both on file, and it appearing to the court that the said demurrer and motion are not well taken, the same are hereby overruled, and the defendant saying nothing farther in
418 bar of the plaintiff's action and resting on its said demurrer and motion, and it appearing to the court that on the 22d day of June, 1876, the plaintiff recovered in this court of the City of Memphis the sum of eleven thousand and one hundred and fifty-seven 87 dollars, and the further sum of twenty-six dollars and ninety-two cents ($26.92), the costs of the suit, for which execution was ordered to issue; that execution has issued on the said judgment and has been returned by the marshal that the defendant has no property whereon to levy for the satisfaction of the same; that the defendant has power to levy and collect a tax for the payment of said judgment and no other means whereby to satisfy the same, but has neglected and refused to levy such
419 tax, or pay the said judgment, and that the whole thereof, and the interest that has accrued thereon, remains unpaid and due. It is therefore considered, ordered and adjudged that the alternative writ of mandamus heretofore issued be made peremptory and final, and

that the defendant through its mayor and general council and the officers and agencies provided by law do proceed at its next levy of taxes to levy a tax in addition to all other taxes allowed by law to be levied, sufficient in amount to pay the judgment aforesaid including the interest accrued and to accrue, and the costs, and the costs of this suit which have been taxed at the sum of on all the taxable property in the city of Memphis and to collect the same as pre-
420 scribed by law and to pay over the sums collected to the plaintiff or his attorneys of record from time to time as collected towards the satisfaction of the said debts, until the entire amount due shall be paid; that a peremptory writ of mandamus issue accordingly, and that the defendant make return to this court of the manner in which it has obeyed the same. It is further ordered that the plaintiff do recover of the defendant the costs herein expended and that execution issue therefor.

421 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1876, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 26th day of February, A. D. 1878, in the following cause, to wit:

JAMES A. LOUDON, PLAINTIFF,
vs.
CITY OF MEMPHIS, DEFENDANT. } No. 2224.

On motion of attorney for the defendant and for satisfactory reasons to the court appearing, it is hereby ordered by the court that the judgment heretofore entered in this cause at a former day of the present term, to wit, on the 24th day of February, 1877, be and the same is hereby set aside, and leave is granted defendant to file its return.

422 JAMES A. LOUDON
vs.
THE CITY OF MEMPHIS.

Circuit court of the United States for western district of Tennessee.
No. 2224 law docket.

And now comes the defendant, the City of Memphis, and for return to the alternative writ of mandamus heretofore issued in this cause it states that it has not obeyed the commands of the said writ, and assigns the following causes as reasons for not having obeyed the same, to wit:

1. By the 81st section of the act of the legislature of the State of Tennessee, passed March 23, 1875, and entitled "An act to regulate and organize municipal corporations of certain population, and for the increase and dimunition of their powers," the act passed March 18th,
423 1873, and referred to in relator's petition was repealed. Said act of March 18th, 1873, was enacted long after the execution of said contracts for paving between relator and the City of Memphis were entered into and performed by relator, and after judgments for the bal-

ance due him had been recovered in the circuit court of Shelby County, as stated in the petition, the act of March 18th, 1873, therefore, was not part of plaintiff's contracts, and the legislature had power to repeal the same at pleasure.

2. Except as provided in said act of March 18th, 1873, and for cases falling within the terms of said act, the taxing power of the defendant, with certain designated and special exceptions, (relator's case not falling within said exceptions,) is limited to an annual tax of one per cent. or one dollars on every one hundred dollars of taxable property.

424 By the act of February 13th, 1854, entitled "An act to amend the charter of the city of Memphis," and being chapter 195 of the acts of 1853-'54, it was enacted that "the board of mayor and aldermen shall have power to lay and collect taxes for the purpose of defraying expenses necessarily incurred in administering the affairs of the city, but the tax for that purpose shall never exceed one per centum or one dollar on every hundred dollars' worth of property within the city limits liable to taxation, and valued at cash prices."

This provision remained in force until and was literally re enacted by the 55th section of the act of December 1st, 1869, and that "An act to reduce the charter of the city of Memphis, and the several acts amendatory thereof into one act, and to revise the same," being chap. 26

425 of the acts of 1869-'70, and this latter act remained in force until the passage of said act of March 23rd, 1875. This last act, from section 33 to its close, applies to the city of Memphis, said city having a population of over 35,000 inhabitants by the federal census of 1870. By the 63rd section of said act it is enacted that said city shall not "assess, levy or collect a greater rate of taxes than one dollar and sixty cents on each one hundred dollars' worth of taxable property in such city, for any and all purposes."

By the 64th section it is enacted that, of the one dollar and sixty cents permitted to be levied by the 63d section "not more than one dollar or one per cent. shall be appropriated to defraying general expenses, such as police and fire departments, officers' salaries, water and lights, improving or repairing streets, &c., and not more than

426 60 cents shall be appropriated to special purposes; of this amount 20 cents shall be appropriated to the payment of interest on the bonded debt; 25 cents shall be appropriated to providing a sinking fund to retire the bonded indebtedness; ten cents shall be appropriated to the maintenance of the city schools, and 5 cents to the payment of judgments." The limit, therefore, upon said city's powers of taxation, as fixed by said section 63 of the said act of March 23d, 1875, was but the re-enactment of a law in force continuously from 1854 to that time, and in force during all the period of the execution and performance of said paving contracts, except as the same was affected by said repealed act of March 18th, 1873.

427 It would be illegal, therefore, for defendant to levy a special tax in addition to all other taxes allowed by law to pay relator's judgments, as commanded by the alternative writ, defendant cannot exceed the limit prescribed by the said act of March 23d, 1875.

3. It is not true that said J. and M. Loudon brought suit in the circuit court of Shelby County, against the defendant on its guaranty of the payment of the sums that might become due to them for paving laid down by them under the said contracts; nor was the judgment on which this proceeding is based recovered on that guaranty. The truth is that in the year 1867, as stated in the petition, said J. and M. Loudon entered into contracts with the city by which they undertook to pave certain

streets and alleys, among them Front street, and the public land-
428 ing or wharf, with trap-blocks or stone. By the terms of said contracts all pavement laid in front of private property was to be paid for to the center of the street by the owner of such abutting property, under special assessments laid according to the frontage of the property, on the street or alley so paved, and the city guarantied the payment by such owners of said special assessment. As to the west half of Front street, all the public wharf or landing, and all intersections of streets or alleys, there was no abutting private property, and for the pavement to be laid thereon, the city agreed to pay primarily and in the first instance, by notes to be executed at the completion of each section of the work, and payable 12 months after date. The judg-
429 ments upon which this petition is based were recovered upon notes, executed as aforesaid, in payment of the pavement laid upon intersections of streets and alleys, the west half of Front street, and the public landing. In so far as defendant was ever liable upon its guaranty of payment by the owners of abutting property, the same was settled and paid without suit.

Inasmuch therefore as the sums due to relator upon which his said judgments were recovered were not due for the cost of an improvement for which had been made special assessments, afterwards declared illegal and void by the supreme court of the State, the relator's case is not within the terms of said act of March 18, 1873. No special assessments were ever made or contemplated to pay for the pavement for
430 which said notes were executed. The same was agreed to be paid primarily by the city and necessarily was to be paid with money to be derived by general tax.

For these reasons defendant has not obeyed said writ, and prays to be hence discharged.

CITY OF MEMPHIS.
By S. P. WALKER, *City Att'y.*

(Endorsed:) 2224 law docket. United States circuit court, western district of Tennessee. James A. Loudon, vs. The City of Memphis. Return of city. Filed Feb. 28, 1877. H. E. Andrews, clerk. S. P. Walker.

431 In the circuit court of the United States for the western district of Tennessee.

JAMES A. LOUDON,
vs.
THE CITY OF MEMPHIS.

The plaintiff comes and demurs to the answer or return herein filed on the part of the defendant because—

(1.) The repeal of the act of 18th March, 1873, was not intended to affect and did not affect the right of the plaintiff to have the tax thereby authorized, levied for the payment of his debt, now evidenced by the judgment of this court.

(2.) The city had and still has ample authority to levy a tax sufficient for the payment of the plaintiff's judgment independent of as well as under and by virtue of the said act of 18th March, 1873.

432 (3.) The limitations on the city's power of taxation continued in the acts of the legislature referred to in the return or answer of the city do not apply to taxation for extraordinary or discretionary purposes, such as taxation to pay a debt for paving the streets and alleys

with stone by special contracts made under specific authority conferred by a special act of the legislature.

4. The act of the 23d March, 1875, so far as it undertook to repeal the act of 18th March, 1873, and so far as such repeal may affect the right of the plaintiff to have a tax levied to pay his judgment, and so far as such act of 23d March, 1875, otherwise impairs the right of the plaintiff to have a tax levied sufficient to pay his judgment is unconstitutional and void.

(5.) No sufficient reasons are shown why the city does not
433 proceed to levy the tax, the alternative writ commands it to levy.

And for replication to the part of the return not answered by the foregoing demurrer, the plaintiff says that the debt for which the judgment recited in the alternative writ of mandamus was recovered, accrued in the manner stated in the said alternative writ and in the petition on which the said writ is based, and not in the manner set out in the said return, and the defendant is estopped by the allegations in the declaration in the suit in which the judgment recited in the said alternative writ and the said petition was recovered, and by the said judgment, from denying the truth of the statements of the said petition and alternative writ as to the manner in which the said debt
434 accrued, and the plaintiff here pleads and relies upon the record in the said suit as such estoppel, wherefore, &c.

RANDOLPH, HAMMOND & JORDON,
For Plaintiff.

(Endorsed:) No. 2224 L. D. Circuit court of the United States, western district of Tennessee. James A. Loudon, vs. City of Memphis. Demurrer and replication to return. Filed January 11, 1878, H. E. Andrews, clerk. L. H. Pillsbury, D. C. Randolph, Hammond & Jordon.

435 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its Nov. term, A. D. 1877, at the United States court house, in the City of Memphis, in said district, on, to wit, the 20th day of Feb., A. D. 1878, in the following cause, to wit:

JAMES A. LOUDON, PLAINTIFF,
vs.
THE CITY OF MEMPHIS, DEFENDANT. } No. 2224.

This cause was this day heard on the demurrer of the plaintiff to a part of the return of the defendant to the alternative writ of mandamus herein issued, and the replication to the part of the return not demurred to, and the record and proceedings in this cause, and the record and proceedings in the cause wherein the plaintiff recovered of the
436 defendant the judgment recited in the said original writ, and it appearing to the court that the return of the defendant shows no sufficient ground for the refusal of the defendant to comply with the requirement of the alternative writ of mandamus, and that the command of the said writ ought to be obeyed, it is ordered that the same be made peremptory and final. And it further appearing that on the 22nd June, 1876, by the consideration and judgment of the court here, the plaintiff

recovered of the defendant the sum of eleven thousand one hundred and fifty-seven dollars and eighty-seven cents ($11,157.87), and the further sum of twenty-six dollars and ninety-two cents ($26.92),
437 the costs of the suit, for which execution was ordered to issue; that such execution has since been issued, and has come to the hands of the marshal of the United States for the western district of Tennessee, and has been returned by him with the return thereon endorsed that the defendant has no property subject to levy for the satisfaction thereof; and that the said judgment remains in full force and in no way set aside, paid or reversed, and that the defendant has no property subject to execution at law out of which the said judgment or any part thereof can be made by process, and has altogether failed and neglected to make payment or provide the means of payment, or to levy any tax for the purpose of making payment of such judgment.
438 And it further appearing to the court that the defendant has by law the power to levy a tax in addition to all other taxes allowed by law to be levied, for the purpose of paying and satisfying the said judgment, it is therefore considered, ordered, and adjudged that the defendant and its mayor and general council, through the officers and agencies provided by law, do proceed at its next levy of taxes to levy a tax in addition to all other taxes allowed by law to be levied, on all the taxable property in the City of Memphis taxable by law, sufficient in amount, after making proper allowances for errors, insolvencies and defaults, to pay the judgment aforesaid, including the interest
439 accrued and to accrue, and the costs of the suit in which said judgment was recovered, and the costs of this present suit in which the costs have been taxed at the sum of fifty-seven and $\frac{00}{100}$ ($57.00) dollars, and to collect such tax in the lawful money of the United States in the manner prescribed by law, and to pay over the sums collected to the plaintiff or his attorneys of record from time to time as collected towards the satisfaction of the said debts, until the entire amount due shall be paid, that a peremptory writ of mandamus do issue accordingly; and that the same be served as prescribed by law, and that the defendant make return hereof to this court and of the manner in which it has obeyed the same, on or before the first day of the term to be held
440 next after its issuance. It is further ordered that the plaintiff recover of the defendant the costs herein expended, and that execution issue therefor.

441 In the circuit court of the United States for the western district of Tennessee.

JAMES A. LOUDON
vs.
THE CITY OF MEMPHIS. } No. 243.

In the above cause for the purpose of saving the encumbering of the record, it is agreed as follows:

(From p. 32 to p. 74 of the transcript.)

That the copy of the contract for the laying of the stone pavement in the streets and alleys of the City of Memphis, made between J. and M. Loudon and the city, copied in the transcript of the record from the supreme court of the State of Tennessee, in case of P. C. Bethel v. The City of Memphis, on file herein, is a true copy of the original contract

of which it purports to be a copy, and may be used in the place and stead of the original for all the purposes of evidence in this suit.

And it is further agreed that the other contracts between the
442 same parties for the laying of the said stone pavement on the other streets and alleys, mentioned in the bill, were the same in substance as the said contract so copied and that neither the originals nor copies used need be produced, and that the said copy may stand and be used in the place and stead of such originals and copies for all the purposes of evidence in this cause.

It is not intended by this agreement to waive any objections to the relevancy and competency of the said originals and copies as evidence, but all such objections are reserved.

(2.) It is agreed that the contracts for paving a portion of the wharf and landing mentioned in the bill between the firm of J. and M. Loudon and the City of Memphis, need not be produced as evidence in this cause and that the copy on file is a true copy, and may be used for all the purposes of evidence in the cause in the place and stead of the original.

443 It is further agreed that the other contracts between the same parties for the paving of the said wharf and landing mentioned in the bill, were the same in substance as the said contracts so copied, and that neither the originals nor copies need be produced, and that the said copy may stand and be used in the place and stead of such originals and copies, for all the purposes of evidence in this cause.

It is not intended by this agreement to waive any objections to the relevancy and competency of the said originals and copies as evidence, but all such objections are reserved.

And it is further agreed that the record of the suits of Jas. A. Loudon v. The City of Memphis, and P. C. Bethel vs. The City of Memphis, in this court, including the actions on the judgments in the State court, and the proceedings to compel by mandamus the levy of a tax to pay the judgments of this court in their favor, being Law docket Nos.

444 now remaining in court here may be used by either party as evidence on the hearing of this cause, without filing copies; and that in case of an appeal the said original records may be copied into the transcript of the record for the Supreme Court of the U. S.

S. P. WALKER, *City Att'y*,
RANDOLPH, HAMMOND & WASSELL,
For Pl'ffs.

(Endorsed:) Eq. D. No. 243. Circuit court of the United States, western district of Tennessee. J. A. Loudon vs. The City of Memphis. Agreement as to copies of records & contracts. Filed May 25, '78. H. E. Andrews, clerk, by L. H. Pillsbury, D. C.

445 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1878, at the United States court house, in the city of Memphis, in said district, on, to wit, the 28th day of May, A. D. 1878, in the following cause, to wit:

JAMES A. LOUDON, PLAINTIFF,
vs. } No. 243.
THE CITY OF MEMPHIS, DEFENDANT.

This cause was this day heard before the Hon. John Baxter, judge,

on the bill and the exhibits thereto, the answer to the bill and the replication to the answer, the depositions of James A. Loudon, Hopkins Loudon, Ben Richmond, Wm. M. Sneed, S. Fransiola, John Overton, jr., F. C. Shaper, J. A. Newsom, and G. A. Hanson, on the part of the plaintiff, and of John Johnson, on the part of the defendant, the
446 transcripts of the record of the three suits of J. and M. Loudon vs. The City of Memphis, The State of Tennessee, on the relation of James A. Loudon, vs. John Loague and others, and P. C. Bethell vs. The City of Memphis, all on file, and the agreement in writing of counsel, and the copies of the contracts mentioned and referred to in the said agreement, and the records of the four (4) suits in this court mentioned, also mentioned therein, and the copies of the ordinances of the defendant levying taxes for the years 1871, 1872, 1873, and 1874, respectively, and the record and proceedings in the cause, and it appearing to the court that the plaintiff is not entitled to the relief by him specifically asked on his bill, or any part thereof, such relief is by the court refused.

But it further appearing to the court that the defendant has not
447 performed its part of the agreement entered in September, 1872, between it and J. and M. Loudon, as shown by the record, and that the plaintiff is entitled to have the same specifically performed to the extent to which he still owns or holds the judgments mentioned and referred to in the said agreement; and that the plaintiff still owns and holds a judgment in this court against the City of Memphis, rendered on the 22d day of June, 1876, for the sum of eleven thousand one hundred and fifty seven dollars and eighty-seven cents ($11.157.87) and the costs of the suit, which have been taxed at the sum of twenty-seven dollars and sixteen cents ($27.16), which judgment is founded on the balance due the plaintiff on the judgments mentioned and referred to in the said agreement of September, 1872, not heretofore sold or assigned by the plaintiff, it is therefore ordered, adjudged, and decreed
448 that the defendant, and its mayor and general council, do from and after this date set apart and appropriate three-tenths of the amount that may be collected upon or from the tax heretofore levied, or hereafter to be levied, for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, otherwise called the tax for general expenses, including as well the tax levied for the year 1872, and the years since then, as the tax for the present and future years, for the payment of the said judgment so remaining in this court in favor of the plaintiff against the defendant, and do pay over the same to the plaintiff, or his solicitors of record, in the lawful money of the United States of America, from time to time, as the same may be collected, until the said judgment,
449 including principal and interest and costs, shall have been fully paid, and until the said judgment may be satisfied; that they report in writing to the court here monthly at the end of each month, beginning with the month of June, A. D. 1878, the amount of the said tax so collected since the rendition of this decree, or since the last preceding report, and the proportion of the amount so collected paid over to the plaintiff or his solicitors under this decree, and the date or dates of such payments. It is further ordered that the clerk make and certify a copy of this decree, and that the marshal serve the same upon the defendant, to the end that it may proceed in obedience to the same. And it is further ordered that the plaintiff recover of the defendant the costs of this suit, and that the same be paid out of
450 the said three-tenths of the said tax in the same manner that the

judgment aforesaid is before directed to to be paid. It is further ordered that any sums or sums of money collected and paid over to the plaintiff under or in pursuance of the peremptory mandamus heretofore awarded and issued from the law side of this court, commanding the levy and collection by the defendant of a special tax for the payment of the said judgment herein decreed to be paid, shall be taken and treated as payments on the said judgment under this decree, and whenever the said judgment, including interest and costs accrued and to accrue in the suit and the cost of the suit in which the said peremptory writ of mandamus was so awarded and issued, shall have been paid and satisfied, then the defendant shall not be required to take any further action under this decree, or under the said writ of mandamus, and the plaintiff is required to acknowledge satisfaction of the judgment aforesaid.

451 Supreme Court of the United States.

JAMES A. LOUDON
vs.
CITY OF MEMPHIS. } No. 243.

Know all men by these presents, that we, the City of Memphis, as principal, and John R. Flippin, as surety, are held and firmly bound unto J. A. Loudon in the sum of two thousand dollars, to be paid to the said Loudon, his executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors and administrators firmly by these presents, sealed with our seals, dated this 13th day of June, 1878.

Whereas the above-named City of Memphis hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee:

Now, therefore, the consideration of this obligation is such that if the above-named City of Memphis shall prosecute its said appeal to effect, and answer all costs and damages if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

THE CITY OF MEMPHIS, [SEAL.]
By its solicitor, S. P. WALKER. [SEAL.]
J. R. FLIPPIN. [SEAL.]

Acknowledged before me this 13th day of June, 1878.
BELL W. ETHERIDGE, *Clerk.*

Approved.
CONNALLY F. TRIGG,
U. S. District Judge, &c.

452 (Endorsed:) No. 243. Circuit court of the United States, western district of Tennessee. Jas. A. Loudon vs. City of Memphis. Appeal bond to United States Supreme Court. Filed the 13th day of June, A. D. 1878. Bell W. Etheridge, clerk.

453 Supreme Court of the United States.

Know all men by these presents, that we, James A. Loudon, as principal, and Hopkins Loudon, as surety, are held and firmly bound unto the City of Memphis in the sum of five hundred dollars, to be paid to

the said City of Memphis, its executors or administrators, to which payment well and truly to be made we bind ourselves, and each of us jointly and severally, and our and each of our heirs, executors and administrators, firmly by these presents, sealed with our seals, dated this 13th day of June, 1878.

Whereas the above-named hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled action by the circuit court of the United States for the western district of Tennessee, sitting in equity:

Now, therefore, the consideration of this obligation is such that if the above-named James A. Loudon shall prosecute his said appeal to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise to remain in full force and virtue.

JAMES A. LOUDON, [SEAL.]
By WM. M. RANDOLPH, *Att'y.* [SEAL.]
HOPKINS LOUDON. [SEAL.]

Acknowledged before me this 13th day of June, 1878.
BELL W. ETHERIDGE, *Clerk.*

Approved.
CONNALLY F. TRIGG,
Judge, &c.

454 Personally appeared before me, Hopkins Loudon, who, being duly sworn, deposes and says that he is worth the sum of one thousand dollars in unincumbered real estate situated in the western district of Tennessee, and which is subject to execution.
HOPKINS LOUDON.

Subscribed and sworn to before me this 13th day of June, 1878.
BELL W. ETHERIDGE,
Clerk.

(Endorsed:) No. 243. Equity. Circuit court of the United States, western district of Tennessee. Jas. A. Loudon vs. City of Memphis. Appeal bond to United States Supreme Court. Filed the 13th day of June, A. D. 1878. Bell W. Etheridge, clerk.

455 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 13th day of June, A. D. 1878, in the following cause, to wit:

JAMES A. LOUDON, PLAINTIFF,
vs.
THE CITY OF MEMPHIS, DEFENDANT. } No. 243.

The plaintiff this day prays an appeal from the decree herein rendered denying the relief prayed in his bill, and he having executed an appeal bond in the penalty of five hundred dollars, conditioned according to law, with surety, which is approved by the court, such appeal is granted to the next term of the Supreme Court to be held at Washington on

the second Monday of October, 1878. And the defendant being in court waives the issuance and service of a citation and agrees
456 to appear and defend the same without further notice.

457 UNITED STATES OF AMERICA,
Western District of Tennessee:

In the circuit court of the United States, within and for the western district of Tennessee, in the sixth judicial circuit thereof.

Proceedings had in said court, at a regular term thereof, begun and held for its May term, A. D. 1878, at the United States court-house, in the city of Memphis, in said district, on, to wit, the 13th day of June, A. D. 1878, in the following cause, to wit:

JAMES A. LOUDON, PLAINTIFF,
vs.
THE CITY OF MEMPHIS, DEFENDANT. } No. 243.

The defendant in open court prays an appeal from the final decree entered at the present term to the next term of the Supreme Court of the United States, to be held at Washington on the 2d Monday in October next. And thereupon the court in open session fixed the amount of the penalty of the appeal bond to operate as a supersedeas, at the sum of two thousand dollars. And the appeal bond in the penalty afore-
458 said, having been executed by defendant with surety satisfactory to and approved by the presiding judge, and conditioned as prescribed by law, the said appeal is granted. The complainant being in court at the time this appeal is granted, waives citation and notice of the appeal and agrees to enter his appearance in the Supreme Court and defend said appeal without further notice.

459 THE UNITED STATES OF AMERICA,
Sixth circuit and district of West Tennessee:

I, Bell W. Etheridge, clerk of the circuit court of the United States for said district of West Tennessee, do hereby certify that the papers hereto attached are a full, true, perfect and correct copy of the original record and proceedings in the State and U. S. courts of Shelby Co. and in said court as the same now appear of record and upon the files in my office in the following cause, to wit, James A. Loudon vs. The City of Memphis.

In testimony whereof I have hereunto set my name and affixed the seal of said court, at office in the city of Memphis, this 1st day of July, A. D. 1878, and of the Independence of the United States the 102d year.
[SEAL.]
BELL W. ETHERIDGE, *Clerk.*

Transcript fee, $97.50. Paid by Louden. H. E. Andrews, D. C.

(Indorsement on cover:) No. 146. James A. Loudon, appellant, vs. The City of Memphis. W. Tennessee C. C. U. S. Filed 24th December, 1878.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1881.

JAMES A. LOUDON, Appellant,

VERSUS

THE CITY OF MEMPHIS, Appellee.

No. 146.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WEST TENNESSEE.

BRIEF OF WM. M. RANDOLPH,

OF COUNSEL FOR APPELLANT.

S. C. Toof & Co., Printers, Memphis, Tenn.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1881.

JAMES A. LOUDON, Appellant,

VERSUS

THE CITY OF MEMPHIS, Appellee.

No. 146.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES, DISTRICT OF WEST TENNESSEE.

STATEMENT OF FACTS.

The facts necessary to be understood in order to the determination of this case are substantially these:

The firm of J. & M. Loudon, of which the appellant is the survivor, had several contracts for paving portions of the public streets and alleys of the city of Memphis with stone. They had other contracts for similarly paving portions of the wharf and public landing on the river front. By the terms of the contracts the city was to pay for the paving done upon the streets and alleys in front of the public property, or the property of the city, and was to pay for the paving done upon the wharf and public landing. The city gave them notes for the work so chargeable directly to it. When the notes matured, they were not paid, and, after waiting several years, J. & M. Loudon sued

upon them and obtained judgments against the city in the circuit court of Shelby county for near $65,000. These judgments (for there were four of them by agreement) were rendered on the 4th of November, 1871.

In order to do the work and furnish the materials required for the performance of the contracts, J. & M. Loudon were obliged to borrow, and did borrow, large sums of money from time to time, as the work progressed, at heavy rates of interest, relying upon the performance by the city of its part of the contracts to enable them to repay the money thus borrowed. These loans were contracted with the knowledge of the city and its officers, and the notes given by the city, and the judgments, after they were rendered, with the knowledge of the city and its officers, were pledged to the lenders as collateral security for the repayment of the sums borrowed. The rates of interest J. & M. Loudon were paying were also known to the city and its officers.

By the terms of the contracts for paving the public streets and alleys, already referred to, the property owners were charged with the payment of the cost of the pavement laid down in front of their property. The cost was apportioned among them in proportion to the frontage of the property on the street or alley paved. The half of the cost so apportioned was to be paid by the property owners upon the completion of each section in cash, and the balance was to be paid in 30, 60 and 90 days, in equal proportions, and the property owners were to give their notes therefor.

The city of Memphis, by the contracts, guaranteed to J. & M. Loudon the payment of the amounts assessed against the property owners according to the terms of the contracts.

Many of the property owners failed to pay the assessments made upon them, and the city refused payment

under its guaranty, and up to September, 1872 J. & M. Loudon had received nothing on such accounts.

In one of the contracts, made October 22, 1870, for paving certain alleys, the city undertook to bind the property owners exclusively, and inserted in the contract a provision that it, the city, should not be responsible for the payment of the cost of the pavement laid down in front of the property of private owners, and that J. & M. Loudon should look to such owners for payment. Many of the property owners refused to pay for the paving, or to give the notes the contract stipulated they should give, and in September, 1872, about $7800 was due J. & M. Loudon for work done in front of the property of private owners under this particular contract.

In May or June, 1872, the Supreme Court of Tennessee held the contracts the city had made, so far as they undertook to charge the cost of the pavement upon the owners of the abutting property, ascertaining the amounts to be paid by them respectively, by proportioning the cost of the paving of the particular street or alley among the owners of property according to the frontage of such property on the street or alley paved, unconstitutional and void.

Taylor v. Chandler, 9 Heiskell, p. 349.

This decision left J. & M. Loudon without remedy to collect what was due them except against the city. On all the contracts, except that of October, 1870, they had the city's express guaranty, the same in substance as that which was enforced by this court in City of Memphis v. Brown, 20 Wallace, p. 289.

For the work done under this last contract they had to rely upon such liability of the city as arose out of the fact that they had done the work under a contract with it, and it had received, and was then enjoying, the benefit of such work, and the means of payment, as provided in its con-

tract, had wholly failed because of its want of power to provide such means, and without any fault whatever on their part.

The city, after this decision, not only refused to pay what the property owners had failed to pay, but denied its legal obligation to make such payment, and threatened litigation. In September, 1872, the amount so due on the said account was over $30,000, besides interest.

At this time J. and M. London held the judgments before mentioned, in addition to the sum just mentioned, making altogether nearly $100,000, not computing interest. They had borne up for many years, but the load of debt, at the rates of interest they were paying, was too heavy, and they could go no further. The city and its officers then knew, as they had all along been informed, of their condition.

In this condition of affairs the city and J. & M. Loudon entered into an arrangement. It was agreed substantially that J. & M. Loudon should accept the bonds of the city dated November, 1870, and due 30 years after date, with 6 per cent. interest, payable semi-annually, for which interest coupons were attached, at their face or nominal amount, in payment of the sum due them, including principal and interest, for pavement laid down in front of private property under the contracts for paving the streets and alleys of the city, already referred to. That in consideration of their doing so, the city would on or before the 1st day of March, 1873, pay fully, both principal and interest, the four judgments already mentioned, and to that end would set apart and appropriate exclusively for the purpose a sufficient proportion of the general tax previously levied, or then about to be levied, for the year 1872, to pay the said judgments, and that the said proportion of the said tax so to be set apart should not be used for anything but the payment of the said judgments. J. & M. Loudon were

forced by the condition in which they were placed, and by the failure of the city to pay them what it owed them, to agree to the said arrangement, and to accept the city's bonds in payment of the debt the city then owed them, though such bonds were then of the actual value of less than 50 cents on the dollar, and were daily sold in the public market at that price, a fact then well known both to the city and its officers and the said J. & M. Loudon. The sole inducement to J. & M. Loudon thus to make this sacrifice was the city's undertaking to pay the whole of the said four judgments by the time agreed upon and to adopt the course agreed upon and to carry it out faithfully in order certainly to assure such payment. The contract was verbal between the Mayor, representing the city, and J. & M. Loudon, but it is fully proved by Hopkins Loudon and G. A. Hanson in their depositions.

Record pp. 32–37, and pp 85–86.

See also the deposition of the appellant, J. A. Loudon, pp. 27–32.

The city's answer can hardly be said to deny the terms of the contract as set out in the bill, or if it does deny them, it is only by implication or inference.

Record p. 87.

The testimony of the then Mayor, John Johnson, the only testimony offered on the part of the city at all tending to question the testimony offered by J. & M. Loudon as to what the contract was, if it can be said to contradict the Loudons and Hanson to any extent, is certainly not sufficient to overcome their testimony, supported as their testimony is, by the admitted facts and circumstances of the case.

Record pp. 89–90.

It is not denied that the General Council of the city passed the resolution exhibited with the bill as Exhibit B.

Record pp. 13–14.

That resolution sets out the substance of the contract, as it is claimed to have been by the appellant, and would of itself, as I submit, establish the truth of the allegations of the bill as to what the contract was.

After the arrangement had been agreed upon between the city and J. & M. Loudon, the General Council, with a view to carrying out what the city had agreed to do, on the 4th of September, 1872, passed a resolution authorizing the Mayor to deliver J. & M. Loudon the bonds in payment of the indebtedness due them for paving the streets and alleys, and declaring that three-tenths of the amount that might be collected upon the tax levied for the year 1872 for the purpose of defraying the expenses necessarily incurred in administering the affairs of the city, or so much thereof as might be necessary for the purpose, be and the same was thereby appropriated and set apart for the payment of the judgments in favor of J. & M. Loudon against the city, according to priority of date, from time to time as collected.

Record pp. 13–14.

Mayor Johnson says it was tacitly understood at tha time that if the taxes of 1872 were not sufficient to pey the judgments they should be paid out of the next year's taxes, that is the taxes for the year 1873. Record, p. 90.

After the General Council had passed the resolution (on the 16th September, 1872,) the city and J. & M. Loudon agreed upon the amount due by the city to them under the contracts for paving the streets and alleys, and fixed the amount, principal and interest, at $45,367.89. Of this sum $37,188.08 was due for work done in front of the property of private owners, under the contracts containing the city's guaranty of payment by the property owners, and $8,179.81 was for work done under the contract of 22d October, 1870, which contained no such express guaranty. The city then delivered J. & M. Loudon 45 of its $1000

bonds and paid them $367.89 in money, and J. & M. Loudon gave it a receipt for the bonds and money, specifying that they were accepted in full payment of the balance due by the city to them, as shown by the account and recapitulation thereto attached.

Record, pp. 14 and 15.

Previous to the arrangement the city had passed an ordinance levying taxes for the year 1872, and the general tax for that year, as levied, was about $267,826.19, and it was three-tenths of that sum which was set apart by the resolution of 4th September, 1872, to pay the judgments in favor of J. & M. Loudon.

Record, pp. 82–83.

Three-tenths of this sum would have amounted to $80,347.85, which would more than have paid the four judgments. Of the general tax for 1872 $185,152.01 was in fact collected by the city before 1st January, 1874, and $18,858.46 was collected after that time and before 1st September, 1877.

Record, p. 83.

Three-tenths of the sum thus actually collected before 1st January, 1874, was $55,545.60, and before 1st September, 1877, $61,203.14.

After the arrangement of September, 1872, as the city understood they intended before it was entered into, J. & M. Loudon used the bonds they received from the city as collateral security to obtain further time on the loans they were carrying, expecting soon to pay off the loans with the money they were to receive under the arrangement on account of the judgments, and then to hold the bonds as a safe permanent investment.

The city made no payments on the judgments in favor of J. & M. Loudon after September, 1872, until 14th January, 1873, when $1500 was paid. Other payments were

made on the judgments up to 7th January, 1874, amounting altogether to about $————, and at that time payments wholly ceased, and since then none have been made.

Record, pp. 15–16 and 83–84.

Of the payments made, many were by crediting taxes due the city, and J. & M. Loudon, in order to induce the tax-debtors to use their judgments in payment of the taxes they owed, were obliged to discount the judgments, and to lose the amount of the discount.

Record, pp. 81, 82 and 85, and pp. 34–35

J. & M. Loudon and others for them made strenuous and repeated efforts to obtain payment of the judgments. After they had failed to get the money promised them out of the taxes of 1872, the prospect was held out to them that they should be paid out of the taxes of 1873, and that a portion of those taxes would be set apart for the purpose.

Record, pp. 8, 9 and 90.

They were thus encouraged to continue the struggle to carry their loans. There was a change of the city administration in January, 1874, and the new administration wholly repudiated the arrangement of September, 1872, and refused to recognize that J. & M. Loudon had any rights thereunder.

Record, pp. 9 and 35.

J. & M. Loudon then resorted to the courts of the State, and by proper petition asked that a mandamus issue requiring the city to pay them the judgments, or specially set apart and appropriate thirty cents of each dollar of taxes collected for the years 1872 and 1873, or so much thereof as might be necessary, or some other specific part of its revenue, sufficient in amount for the sole and exclusive purpose of paying the said judgments, and to pay over the same from time to time as collected until the said judgments should be satisfied. The relief asked, and all relief,

was refused by the circuit court, and on appeal by the Supreme Court of the State, and the petition was dismissed.

Record, pp. 38–49.

In the levy of taxes for the year 1874, no provision was made for the judgments of J. & M. Loudon, and the city has never since manifested the least concern as to their payment, not having paid anything on account of them since January, 1874.

In December, 1873, being unable to hold up longer, J. & M. Loudon were obliged to sell one judgment against the city for $11,546 at a discount, losing by the sale $1243. Before selling they had paid $1000 interest on the debt the judgment was pledged to secure, and they sold simply because the creditor to whom the debt was due would give no further time, and the city would not pay the judgment. In June, 1874, they were obliged, for like reasons, to sell the large judgment for $32,084.87, and thereby lost the sum of $5000. Before making such sale they had paid $3000 as interest on the debt the judgment was pledged as collateral to secure. The appellant, as surviving partner, retained the other two judgments, or the balances due on them when the bill was filed, and he had brought an action at law in the circuit court of the United States to secure such balances, which action was then pending, and afterwards, before the hearing of the cause in the court below, had resulted in a judgment in favor of the plaintiff against the city for the amount due. They paid large amounts of interest on the debts these two judgments were pledged as collateral to secure.

Record, pp. 9, 10; pp. 28, 30; pp. 33, 35; pp. 81, 82; pp. 83 and 85.

In addition to selling the two judgments, J. & M. Loudon were forced, by reason of the same facts, to sell the bonds of the city they had received under the arrangement of September, 1872, except eight which they held when the

bill was filed, in order to pay the debts they owed, and realized about 50 cents on the dollar for them, which was the best price that could be obtained. By such sale they realized just half the amount of the debt of the city they had taken the bonds for, and lost the other half of the debt. Before selling the bonds they paid a large amount of interest on the debts the bonds were pledged as collateral to secure.

Record, pp. 10, 30, 34, and pp. 80 and 81.

Bethell, the assignee of the large judgment in favor of J. & M. Loudon, after the assignment to him, brought a suit to compel the levy of a tax for the payment of the judgment, and the circuit court decided the city could not be compelled to levy a tax for its payment, and its judgment was affirmed, on appeal, by a tribunal exercising the functions of the Supreme Court of the State.

Record, pp. 49, 80.

Taken in connection with the decision that J. & M. Loudon could not compel the performance by the city of its part of the arrangement of September, 1872, this last decision practically fixed the fact that J. & M. Loudon had not through the courts of the State of Tennessee any remedy for the collection of their judgments, nor any way of forcing the city to perform its contracts.

The city then procured the General Assembly to repeal an act which had been supposed to confer upon it the power to levy a tax to pay J. & M. Loudon's judgments.

See ch. 67 of the Acts of Tennessee for the year 1873, p. 102, and Acts of Tennessee for year 1875, ch. 91, sec. 81, pp. 167 and 168.

By reason of the premises the bill claims that J. & M. Loudon were not only deprived of all profits on the labor performed by them for the city, but were deprived even of compensation, and had been well nigh reduced to absolute bankruptcy.

The particular demands the bill asserts are these:

(1.) The $45,000 debt for which J. & M. Loudon accepted the bonds of the city, less the value of those bonds, and interest on the balance of such debt.

(2.) The interest on the sums of money J. & M. Loudon were forced to borrow by the failure of the city to pay them the sums it owed them as the same became due, or, at least, so much of the said interest as was in excess of six per cent., which was the rate calculated upon what the city owed J. & M. Loudon.

And (3) the sums J. & M. Loudon lost by the sales of the two judgments against the city, made under the circumstances before related, and interest thereon.

The prayer of the bill is that the settlement or arrangement of September, 1872, between J. & M. Loudon and the city, so far as it interferes with a recovery by the appellant, be set aside and vacated; that the city may be decreed to pay the appellant all that in justice and equity it ought to pay him by reason of the facts stated in the bill; that the proper accounts for the purpose of ascertaining the amount due may be taken and stated under the direction and order of the court; that the city may be compelled by proper process to pay the sums found due; and that the appellant may have all other just, proper and necessary relief.

Record pp. 11–12.

The cause was heard on the bill, the answer of the city, replication to the answer and proofs on both sides, and a decree rendered that the appellant was not entitled to the relief prayed in his bill, but was entitled to a specific performance of the agreement entered into in September, 1872, between the city and J. & M. Loudon, which specific performance, to the extent of the balance then due the appellant on the judgments not disposed of by him, which

balance at the hearing was represented by a judgment in the United States circuit court in favor of the appellant against the city of Memphis, as before stated, was thereupon decreed, and the residue of the bill was dismissed.

Record, pp. 120–122.

From this decree both parties appealed. The plaintiff perfected his appeal, and it is now for hearing; the city failed to file a transcript of the record, or otherwise comply with the requirements of the law, and its appeal was docketed and dismissed at a former term, probably the December term, 1878, under the 9th rule.

ASSIGNMENT OF ERRORS.

(1.)

The court erred in refusing to grant the relief prayed by the bill.

(2.)

The court erred in refusing a decree for the appellant for the amount of the debt due in September, 1872, less the value of the bonds of the city then delivered J. & M. Loudon, and interest on such balance.

(3.)

The court erred in refusing a decree in favor of the appellant for the amount of the interest J. & M. Loudon were forced to pay on the money the failure of the city to pay them what it owed them, as it promised, caused them to borrow, and interest on such sum.

(4.)

The court erred in not decreeing in favor of the appellant for the amount of loss J. & M. Loudon sustained by reason of the sale by them, under the circumstances stated in the bill of the two judgments in their favor against the city of Memphis, and interest on such sum.

(5.)

The court erred in not rendering such a decree as would have compensated the appellant for the several breaches of the several contracts entered into by the city and J. & M. Loudon, as set out in the bill.

BRIEF FOR APPELLANT.

I.

Before the arrangement of September, 1872, the city was certainly liable for all that was due J. & M. Loudon under the contracts between it and them for the paving done in the streets and alleys in front of the property of private owners, and was subject to immediate suit therefor.

The contracts between it and them, with the exception of the contract of October 22, 1870, to be specially noticed below, were exactly similar in every respect to the contracts involved in the City of Memphis v. T. E. Brown, 20 Wallace, 289, the only difference being that the one was for laying the Nicolson pavement, and the other was for laying stone, and contained the very same guaranty of payment by the property owners of the sums assessed upon them as their proportion of the cost of the paving.

In the case referred to the guaranty was held a valid contract of the city, and was construed to be a guaranty of immediate payment upon default of the property owners to pay according to the contract between the city and the contractors, and that there was no necessity for a previous suit against the property owners.

20 Wallace, pp. 309–311.

So far, therefore, as the demand of J. & M. Loudon against the city was made up of work done by them under contracts containing the guaranty of payment by the city, it was a lawful subsisting debt of the city then due, and which the city was justly bound in September, 1872, when the arrangement between it and J. & M. Loudon was concluded, immediately to pay them in money.

Now, as to the contract of October 22, 1870, which did not contain the city's guaranty of payment by the property owners, and is in the Record at pp. 23–26.

That contract was made between the city of Memphis and J. & M. Loudon, who were the only contracting parties. By the contract J. & M. Loudon bound themselves to do the work which they afterwards did, and the city bound itself to cause them to be paid therefor. Certainly no one else promised to pay them, and after the Supreme Court of Tennessee had decided that the property owners were not bound to pay the portions of the cost of the paving assessed upon them, there was no one but the city to whom J. & M. Loudon could look for payment, though they had completed the work, and the city had accepted it as done in compliance with the contract.

The city sought to shield itself from liability behind the following provision in the contract:

> The city will not be responsible for the payment of the bills against the lots or property abutting or abounding the alleys on which the work is done for the work done in front of such lots or property, nor is the city to be put to any costs or attorney's fees or expenses of any kind in effecting the said collections.
>
> Record, pp. 26.

This provision was put in upon the assumption that the contract bound the property owners to pay the portions of the cost of the paving to be charged to them under the contract. J. & M. Loudon expected to be paid for their work, and it is not credible that the city or its representatives contemplated such a contingency as that they should faithfully perform the work, and that there should be no one to pay them for it. The contract all through contradicts any such supposition.

The case therefore stands thus—the city contracted with

J. & M. Loudon to have the paving done, and agreed with them upon the price to be paid for it when it was done, and designated the way in which the money to pay such price should be collected. J. & M. Loudon did the work, and the city accepted it, and they became entitled to the price agreed upon, but the way in which the city had agreed the money should be collected was not lawful, and therefore could not be pursued. Now whose fault was this, if there was any fault any where?

In City of Memphis v. Brown, 20 Wallace, p. 312, the court was considering the liability of the city under a contract similar to the contract here, not containing any guaranty on the part of the city, but differing from the contract here in that it contained no express provision purporting to exempt the city from responsibility, and said:

"The contract was made with the city, and it cannot evade its payment, whether contracted to be paid for directly or through other persons, or by an illegal assessment."

If it were not for the clause containing the exemption from responsibility in the contract now under consideration, the language quoted would be conclusive of the city's liability for the work done by J. & M. Loudon under that contract. Can that clause, under the circumstances already stated, make any difference? I submit it cannot.

The city, a municipal corporation, composed of the people and the territory embraced within its corporate limits, was but the representative of the public in making the contract with J. & M. Loudon, and contracted for the paving of the alleys for the use of the public, and substantially, whatever may have been the form of words used, agreed that the public, which it represented, should pay for the paving. The work has been done, and the city has accepted it, and the public has continuously used it. Can

the city, as the representative of that public, while using the pavement, refuse to pay the cost of it?

Parrish v. Wheeler, 22 N. Y. 494.
Steam Navigation Co. v. Weed, 17 Barbour 378.
Mayor v. Ray, 19 Wallace, 468, 483, &c.
Potter on Corporations, sec. 508.
Gold Mining Co. v. National Bank, 96 U. S. 640.
Peoples Bank v. National Bank, 101 U. S. 181.
Kearney v. Covington, 1 Metcalfe (Ky.), 339.
Dillon's Municipal Corporations, sec. 401, and cases cited in note, secs. 383 and 750 and cases cited.

If the city, in making the contract, was not, as I submit it was, a principal in the contract, but was merely an agent, and the property owners whom it attempted to bind by the contract were its principals, the rule of law that the agent who, for any cause, fails to bind his principal by the contracts he undertakes to make on his behalf, binds himself, applies, and on that ground the city was liable for the paving done under the contract of October 22, 1870.

Story's Agency, sec. 264 and cases cited.

But suppose I am mistaken in the position that the city was bound before September, 1872, for the payment of the price of the work done under the contract of the 22d of October, 1870, I cannot be mistaken in saying that the work was of such a character, and was done under such circumstances that it was lawful for the city of Memphis, after the public had the benefit of the work, to assume the payment to J. & M. Loudon of the price of it, as it did by the arrangement of September, 1872, and that after it so assumed such payment it was as fully bound therefor as it would have been had the paving originally been done at its request and upon its credit.

It was substantially so decided in Lea v. The City of Memphis, 9 Baxter, p. 108–110, where the Supreme Court of Tennessee held that the city of Memphis could, law-

fully, and ought to refund to those property owners who had paid the assessments illegally made upon their property by the front foot to pay for the Nicolson and stone pavements laid down in the streets and alleys in front of such property, the sums paid by them. Of course, if the city could refund to those who had paid contractors for putting down the pavement, it could agree to pay the contractors directly for putting down the same.

Dillon on Municipal Corporations, sec. 385, and cases cited in note.

II.

I think I may safely assume that before September, 1872, the city was indebted to J. & M. Loudon in the amount of all the bills for paving done in front of the property of private owners which had not been paid, whether such paving had been done under the contract of the 22d October, 1870, or under the prior contracts. Or, if I may not assume so much, that I am safe in saying that the city could lawfully assume the payment of all the unpaid paving bills standing against the owners of property, as it did in the arrangement of September, 1872, and that thereafter the amounts due upon such bills became in all respects and for all purposes the valid subsisting debts of the city.

I do not conceive it necessary to argue that there was no consideration for the giving up by J. & M. Loudon of the one-half of the debt due them, as they did by accepting the city's bonds, worth only 50 cents on the dollar, and, therefore, that they were never bound by the arrangement of September, 1872, and could at any time have sued to recover the balance due them over and above the value of the bonds.

Cumber v. Wane, 1 Smith's Leading Cases, * p. 439 and notes.

I shall proceed on a different theory altogether, assuming that the arrangement of September, 1872, was right

and proper in itself, and would have been obligatory mutually upon J. & M. Loudon and the city had it been carried out as was contemplated when it was made.

I am met at the threshold with the question whether J. & M. Loudon in fact gave up half or any other part of what the city owed them in the arrangement of September, 1872, and, surely I am obliged to admit that they received in the bonds of the city an amount nominally equal to their entire debt as then fixed by agreement between them and the city.

But such bonds were not money, and J. & M. Loudon had not by their contract for doing the work agreed to receive them in payment of the price of the paving done by them, and they were not worth, as all the testimony in the record shows, when J. & M. Loudon did receive them, exceeding 50 cents on their face or nominal value, and perhaps not that much.

Conceding as I do for the purposes of this argument that J. & M. Loudon would have been compelled to accept the bonds they received, though worth but half or less of the debt then actually due them by the city, in full satisfaction of such debt had the arrangement of September, 1872, been carried out according to the agreement, my position is that as such arrangement was not carried out, but was abandoned and repudiated by the city, and J. & M. Loudon have received but a small part of what they were to have received under the arrangement, they are not bound by their agreement to accept the bonds in payment of the debt due them, but can now recover such debt as it existed in September, 1872, and interest thereon, giving credit to the city only for the market value of the bonds, or for what they realized by the sale of them.

The case of City of Memphis v. Brown, 20 Wallace 289, in effect sustains the above proposition. In that case

the city had agreed to loan Brown $275,000 of its bonds, similar to those received from it by J. & M. Loudon, to be returned to it at the expiration of a certain specified period, and in consideration thereof Brown had agreed to release the city from all liabilities upon the paving contracts in which the city had agreed to guarantee the payment of the bills against property owners, unless it should be decided by the courts of last resort that the property owners were not liable for such pavement. The city delivered Brown $240,000 of the bonds so loaned, but did not deliver the other $35,000, but instead gave him agreements, which he accepted, to deliver them to his order as soon as they could be signed by the Mayor. The balance of the bonds, the $35,000, were never in fact delivered to Brown, and he returned the agreements to deliver them only on the hearing of the suit—having retained them up to that time.

20 Wallace 294–296.

When Brown sued the city upon its guaranty of the payment of the bills against the property owners, the city relied upon the release contained in the contract of loan as a bar to such suit, and claimed that, even if the release was not effectual, Brown must return to it the bonds actually loaned him, or other similar bonds and the coupons belonging to them, or must give the city credit on what it owed him for the nominal or face value of such bonds and coupons, and could not escape by paying their market or actual value.

In passing upon the effect of the contract of release, the court considered the situations and condition of the parties, not very dissimilar to the situation and condition of the parties here, and mainly upon the ground that the city had not delivered *all* the bonds it had agreed to loan, and had not delivered those it did deliver as rapidly as it had agreed to do, held the release of the city to be inoperative and

void, and allowed Brown to recover as if no release had been agreed on.

20 Wallace 306–309.

As to the bonds loaned Brown, and which he had not returned, the court held that they need not be returned specifically, and that Brown could be required to account for nothing more than their market value. It considered the bonds, not as obligations to pay money of the value of the sums they called for, but as chattels having a market or commercial value, similar to commodities of merchandise, and that even as to the maker, the city, the damages for the non-return of the bonds were the sum they would sell for.

20 Wallace, 303–306. And see Griffith v. Burden, 35 Iowa 138, cited repeatedly as authority in the opinion of the court.

I am not able to see any difference in principle between Brown's case and the case of the appellant. The city owed J. & M. Loudon a large debt, then due, exactly of the same character of the debt due Brown. And while Brown agreed to release the city from liability in consideration of the loan of a certain number of its bonds, a part of which was never delivered him, J. & M. Loudon accepted a certain number of bonds, of a value less than half the debt the city owed them, in payment of such debt upon condition that the money due them upon their judgments against the city should be paid them within a certain fixed time, and only a small part of the money so due them was paid within such time, or has ever been paid them.

Now I submit that in equity J. & M. Loudon's position is the same, if not better than Brown's, and that they should be allowed to recover their debt and interest, giving credit only for the value of the bonds when they received them, or the prices they sold them for.

The case of Brown v. Spofford, 95 U. S., p. 474, appears to me to be directly in point in this case. The syllabus is:

"A party who seeks to avail himself of the conditions of a compromise binding him to the performance of certain acts, in order to discharge the original demand, must first show performance on his part."

In that case the plaintiff had agreed with the defendant to accept $10,000 in payment of an indebtedness of $13,603.96, but the defendant had not paid the $10,000. The court held the agreement, without the actual payment, no bar to the suit to recover the entire debt.

95 U. S. 483–485.

The relief the court below granted the appellant was in effect no relief at all. Before the arrangement of September, 1872, and independently altogether of that arrangement, J. & M. Loudon had the right by law to enforce the collection of all their judgments. They not only had the ordinary remedies provided by the law, but they had the right to the levy of a specific tax for the payment of those judgments.

Ch. 67 of the Acts of Tennessee for the year 1873, p. 102.
Memphis v. United States, 97 U. S., p. 293.
New Orleans v. United States, 98 U. S., p. 381.

The early payment of their judgments was what they contracted for, and was the only consideration moving them to give up half their debt. It was little less than mockery, after they had sacrificed their judgments, and their bonds, and had paid the large sums on account of interest, as appears by the record, all because the city had not made the early payment of the judgments it had agreed with them to make, to tell them they were entitled to a specific performance of the city's contract as contained in the arrangement of September, 1872, and that the city should set apart three-tenths of all the general taxes,

including those of the year 1872, and subsequent years, and apply the same to the payment of the amount due the appellant on the judgments J. & M. Loudon had not disposed of, until such amount was paid. The whole of that amount was not half as much as J. & M. Loudon gave up of their debt when they accepted the city's bonds in September, 1872, and was not a fourth part of the loss they had actually sustained by the failure of the city to comply with its contracts with them. And at the very moment the court below rendered its decree the appellant had a judgment on its law side requiring the city to levy and collect a special tax for the purpose of paying a judgment for the very amount the decree set apart the three-tenths of the general taxes to pay.

Record, pp. 105–119.

III.

The only remaining question, it seems to me, is whether the remedy the appellant has resorted to is such as is capable of affording him the relief appropriate to the case appearing in the record.

The first step towards that relief is the setting aside the arrangement and settlement of September, 1872, between J. & M. Loudon and the city, and the cancellation of the receipt, based on that arrangement and settlement, which J. & M. Loudon gave for the debt they are now seeking to recover. It is very apparent that it is the peculiar province of a court of equity to entertain such a case since, to an action at law for the purpose of recovering the debt, it is more than probable the receipt would be a complete defence.

Story's Eq. J., sec. 523, &c.

Were a specific performance of the arrangement of September, 1872, practicable, manifestly that is what should be granted the appellant. But the circumstances which

have intervened render such performance impossible. It does not follow, however, that the appellant is entitled to no relief, because the contract, as made between J. & M. Loudon and the city, cannot be carried out. On the contrary, the very fact that there can be no performance may be the ground of equitable jurisdiction to afford adequate redress.

The County of Mobile v. Kimball, 102 U. S. 691, appears to be an authority in point.

In that case, after the plaintiff had performed the work on the harbor of Mobile, under a contract with the Harbor Commissioners that it should be paid for in bonds of the county of Mobile, and the work had been approved and accepted, the Legislature of Alabama passed an act limiting the number of the bonds to be issued by the county in payment for work done under the contracts of the Harbor Commissioners. Before the act was passed the Harbor Commissioners had disposed of all the bonds of the county issued to them, and after the passage of the act no more bonds could be issued, and the sum due the plaintiffs for the work they had performed remained unpaid.

Upon this state of facts the plaintiffs filed their bill against the county, and prayed that the county be required to deliver to them the bonds they were entitled to, or pay their value as fixed in the contract, and interest thereon.

The court below granted the relief, and its decree was affirmed by this court.

In answering the objection that a court of equity had no jurisdiction of the case presented, this court said:

"If for any cause the repeal of the law creating the harbor board, or the refusal of its members, or other officials, to act, the contract cannot be specifically enforced, a court of equity will order compensation in damages from

the party ultimately liable. The court will free the case from all technical embarrassments to the end that justice may be done to those who have trusted to the law, and the responsibility of parties receiving benefits under it. The case here is not different in principle from the ordinary case of a party being unable to comply with his contract when specific performance is demanded. If, for example, there be a contract for the purchase of land, with which the purchaser has complied, but in which the vendor has failed, a court of equity will take jurisdiction; and if it be seen that the vendor, from subsequent sales or otherwise, cannot comply with a decree for specific performance, the court will adjudge compensation in damages. So here the court will grant the relief which the complainants, under their contract, are entitled to have, if such relief can be obtained from the county; but if, by reason of intervening obstacles since the contract was made, whether arising from laches or default of its officials, or repealing legislation, this cannot be secured, an alternative and compensatory decree, that is, one for a money equivalent in the form of damages, will be directed. And, as this has been done in the present case, the decree is affirmed."

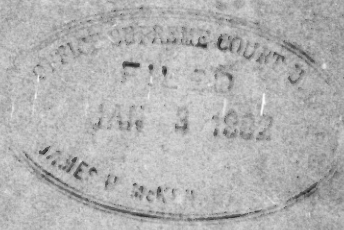
102 U. S. pp. 706–707. And see Pomeroy on contracts (Specific Performances), sec 474 and following.

As to the damages to which the appellant is entitled, they, of course, are such as are the approximate legal result of the breach by the city of its contract with J. & M. Loudon, as contained in the arrangement of September, 1872. The interest they were obliged to pay on the loans they were forced to continue, and the discount they were compelled to submit to when they sold the two judgments in order to pay the debts they were pledged for, may be attributed directly and necessarily to the failure of the city to pay the four judgments according to the arrangement of September, 1872. They, therefore, are legitimate damages.

The balance of the debt due in September, 1872, after crediting the value of the bonds delivered in payment of it under the arrangement, is upon a different basis. It was waived or forgiven by J. & M. Loudon upon a condition which has not been performed, or upon a consideration which has failed. The right to recover it follows from the simple fact that it has never ceased to exist as a just debt of the city, and the conditional release being out of the way, there is no obstacle to its recovery by suit. It stands upon the principle on which the recovery was had in Brown v. Spofford, 95 U. S. 474.

WM. M. RANDOLPH,
Of Counsel for Appellant.

MEMPHIS, November 14, 1881.



No. 146.

IN THE SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1881.

JAMES A. LOUDON,

APPELLANT,

vs.

THE CITY OF MEMPHIS.

APPELLEE.

Appeal from the Circuit Court of the United States, District of West Tennessee.

Jones, Huhn & Co., Printers, Memphis.

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APPELLEE.

Appeal from the Circuit Court of the United States, District of West Tennessee.

This case was revived at the present term against the Taxing District of Shelby County, Tennessee, as the successor of the city of Memphis.

FACTS.

The record shows the following facts: In the year 1867 appellant* entered into various contracts with the city of Memphis to pave certain streets and alleys of that city with stone. As the work progressed the city gave its negotiable notes for the same, as provided in the contracts, (f. pp. 2 & 6). Appellant had from time to time to borrow money to carry on the work (f. 9) and the city failed to pay its notes at maturity (f. 10). Thereupon, on December 8th, 1870, suit was brought, and on the 4th of November, 1871, appellant obtained four judgments aggregating $64,631.18 and costs against the city.

*The firm of J. & M. Loudon entered into the contracts, and appellant is the surviving partner of that firm.

Appellant placed these judgments as collateral security for loans which he had made, instead of the city's notes theretofore placed as collateral (f. 10–12). The city still failed to pay.

In all of the contracts the appellant was to look to the property holders for paving in front of private property, but the city guaranteed the payment of sums so due (f. 14–15), except as to one contract entered into on the 22d day of October, 1870, which contained the express provision, that the city would not be responsible for the payment of the accounts against the property owners, for the paving laid in front of their property, and should not be put to any cost or attorneys' fees, or expenses of any kind, in effecting the collections from the property owners. (f. 19–20. See contract, f. 94). Under this contract, the work so done in front of private property (for which the city by the express terms of the contract was not to be responsible) amounted to the sum of $7,833.33. (f. 21).

In May, 1872, the Supreme Court of Tennessee declared the act providing for front-foot assessment unconstitutional.—9 Heisk., 349.

In September, 1872, the amount due from property holders, for which the city was responsible on its guaranty, was over $30,000 (f. 18), property holders having refused to pay; and also the above $7,833.33 for which the city was not responsible, as heretofore shown. Under these circumstances it was agreed that the whole amount above (over $30,000 and $7,833.33), should be definitely ascertained, interest calculated up to date (f. 22), and for the amount so found, $45,367.89, $37,188.08 on which the city was bound and $8,179.81 ($7,833.33, and interest), on which it was not bound (f. 27–8), appellant would accept the gold-bearing bonds of the city, at thirty years; and in consideration thereof, the city agreed to set apart three-tenths of the one dollar tax to be levied for the general purposes of the city government, for 1872, to the payment of the $64,631.18 judgments. This arrangement was fully consummated. Appellant received the forty-five $1000 gold-bearing bonds (f. 108), and the city council, by resolution (f. 54), appropriated three-tenths of the tax for 1872 to the payment of the $64,631.18 judgments.

The bill alleges (f. 23) that the city agreed to set apart "a sufficient proportion of the 1872 tax to pay said judgments," but the arrangement was, in fact, that the city was to set apart and pay over in discharge of the judgments three-tenths of the general tax for 1872. It is also attempted in record to show that the arrangement was to set apart enough of succeeding years' taxes to pay the judgments.—See dep. of the Loudons, f. 114, 130, 134.

But it is evident that the conversation of these witnesses with the mayor does not make out appellant's case on this point, when it is shown by the testimony of the mayor himself, (Johnson, f. 319) that the resolution (see this resolution, f. 54) contains the whole arrangement. This resolution only appropriated "three-tenths of the amount that may be collected upon the tax levied for the present year" (1872) to the payment of appellant's judgments, (f. 54). The testimony of the witnesses, and of the mayor, for that matter, would be incompetent to contradict the resolution of the municipality of Memphis. The fact therefore is that the arrangement was that the city would set apart for the payment of appellant's judgments three-tenths of what was collected of certain city taxes for the year 1872.

The bonds received by appellant under this arrangement were worth, as appellant knew when he received them, fifty cents of their face value (f. 108), and he realized that for them. (f. 110). After this arrangement, the city paid on the judgments, from time to time, $34,816.16, (f. 61–62). And, the mayor (Johnson) shows that while he remained in office (till 1874) the arrangement as to the three-tenths was faithfully carried out, (f. 319).

It appears that appellant, from time to time, disposed of three of the four judgments at very considerable sacrifice (f. 138, 126, 302), after paying large interest for borrowed money in the meantime. (Ib.). And at the filing of appellant's bill in this cause he still held the judgment against the city for $11,152.87.

The record fails to disclose, so far as we can find, any knowledge on the part of the city, of the fact that appellant was con-

tracting large loans *at heavy rates of interest*, as stated in his counsel's brief, p. 4. Nor does the record disclose, so far as we find, that the city knew of the straits appellant was put to, or the condition he was reduced to, at, and after the arrangement of September, 1872, as stated in same brief, p. 4. Nor is there sufficient in the record to show that the payment in full of the $64,631.16 judgments by the 1st of March, 1873, was the consideration of that arrangement as the brief states—(same page).

Nor do we understand the contract or arrangement of September, 1872, to have been verbal, as stated in the brief at p. 5, but it was in writing as is above shown. (See f. 54, 319). Nor is there sufficient in the record, as we read it, to justify the statement in the brief of appellant's counsel, p. 7, that "the city understood that J. & M. Loudon, before the arrangement of 1872 was entered in, intended to use the bonds they would receive by the arrangement as collateral security to obtain farther time on the loans they were carrying. So far as we read the record, there is nothing to show knowledge on the part of the city that appellant was making or carrying any loans at all.

Proof of this knowledge as to loans and large interest paid is attempted, (f. p. 127), but we submit that it signally fails, (f. 135, 101, 116).

Nor is there a particle of proof that the city procured the repeal of an act supposed to confer upon the city power to levy a tax to pay J. & M. Loudon's judgment, as stated in the brief, p. 10.

And so the denials of the answer (f. 312) stand.

Under the above facts the bill prays for a rescision of the contract or arrangement of September, 1872, (brief of appellant's counsel, p. 11,) and claims—

(1) That appellant be allowed to assert his claim for $45,000 against the city, less the proceeds of the forty-five $1,000 bonds received in settlement thereof.

(2) That city pay all interest on what appellant had to borrow—at least all *illegal interest!**—Brief, p. 11.

(3) All losses of appellant by the sales of his judgments.

The city answers, denying knowledge of sale of bonds or loss suffered by such sales. In short, denies the grounds for relief stated in the bill (f. 312–14), and demurs to the bill—

(1) Because no equity in bill.

(2) The bill shows no sufficient ground for recovery of difference between face value of the $45,000 in bonds received by appellant, on the settlement of September, 1872, because the settlement, as appears from the bill, was made without fraud or mistake. [The appellant got $8,179.81 ($7,833.33 and interest) secured, for which the city was not bound, and had his debt put in a form that he could enforce the payment of it, by compelling levies of special taxes, which could not be done in the form it was before that settlement.]

(3) Appellant adhered to the settlement from September 16, 1872, to filing of bill, April, 1876. Application to rescind comes too late.

(4) Bill does not offer unconditionally to restore all appellant received by settlement.

(5) If the September settlement is rescinded, appellant must rely on his original demand, which is barred by limitation—six years in Tennessee.

(6) The substance of appellant's complaint is an alleged failure on part of city to discharge its money obligations to appellant. Interest allowed by law is all that can be claimed for such failure. (f. 314–17).

The court below refused the relief asked *in toto* (f. 446), but decreed that "the city and its mayor and general council do, from and after this date, set apart three-tenths of the $1 tax, called the general tax, (which was a tax for running the city government), from and including such tax for 1872, and all succeeding years, and pay the same over to appellant until the

*The legal interest in Tennessee is 6 per cent., and appellant especially claims all interest in excess of 6 per cent.

$11,157.87 judgment, then held by appellant against the city, was fully paid." (f. 447–50). The bill did not ask any such relief.

The appellant appealed "from the decree herein rendered, *denying the relief prayed in his bill.*"

And the city appealed from the decree against it, but having failed to docket the appeal, the same was docketed by appellant, and dismissed at the October term, 1878.

BRIEF AND ARGUMENT.

Upon this record we insist—

(1) That the decree refusing the relief asked, was proper.

(2) The decree against the city was improper.

ASSIGNMENT OF ERRORS.

(1) The court erred in granting relief not asked.

(2) In granting relief inconsistent with the relief prayed.

The relief asked was the rescision of the contract or settlement of September, 1872.

There is no proof of fraud on the part of the city inducing appellant to enter into that settlement. No false or fraudulent representation, express or implied, constituting a material inducement to that settlement, upon which appellant relied or had a right to rely.

Adams' Eq., 176, and many cases cited in note 2.

The opinion of the mayor (Johnson) that appellant's debt would be paid (f. 321) cannot be relied on for a rescision. And what Hopkins Loudon says (f. 121) as to the assurance of the mayor that appellant's judgment would be paid by March, 1873, is distinctly and emphatically denied by Johnson. (f. 320). And if it were given, it would not bind the city.

Coil vs. Pittsburg College, 40 Pa. St., 439–445; Warner vs. Daniels, 1 Wood & Min., 90; Hough vs. Richardson, 3 Story, 659; Sprigleheiner vs. Crawford, 6 Paige C. R., 254;

Juzan vs. Tontrim, 9 Ala., 662; Smith vs. Richards, 13 Pet., 26; Glasscock vs. Minor, 11 Mo., 653; Hutchins vs. Browne, 1 Clark C. R., 408.

Indeed the record discloses that this settlement was made fairly and without the least imposition or attempted imposition on either side. And the appellant rested on it, and took the benefits of it for four years, and there is no sufficient allegation in his bill that he only recently (before filing his bill) discovered any fraud. So that even if there were fraud, he comes too late.

Pratt vs. Philbrook, 33 Maine, 17; Kuncholls vs. Sea, 10 Hump. (Tenn.), 577; Brown vs. Hutchinson, Clark's C. R., 408, Stat., p. 287, (3d ed.); Coil vs. Pittsburg College, 40 Pa. St., 439–445.

But there is neither allegation nor proof of fraud, imposition or mistake.

What the case of city of Memphis vs. Brown, 20 Wal. 289, has to do with this case we are unable to see. It is true, in that case there was an arrangement by which the city was to deliver to Brown $175,000 of its bonds (erroneously stated in appellant's brief, p. 20, $275,000,) in which event it should be released from all liability on its guaranty of payment of bills against property holders. But the city failed to carry out this arrangement, and the court says the city was not released. "The agreement," says the court, "was in substance, an exe-"cutory agreement for an accord and satisfaction. * * "The consideration for the release was wholly executory, and "it was never performed; but the release was *dependent entirely* "*upon such performance.* * * The performance failing, the "agreement to release goes with it."—20 Wal., 308.

But here the contract of September, 1872, was fully executed. The $45,000 of bonds were delivered, and the three-tenths were appropriated by resolution of the city council, and appellant's only remedy was to compel the paying over of the three-tenths. At all events he cannot, for *this failure* ask to rescind the contract, any more than Brown could, if the city had

delivered him the $175,000 of bonds, because the city, after that, failed to pay them.

This, it occurs to us, is the difference between this and the Brown case. In that case the court held the city liable on its guaranty, because the agreement for a release therefrom, was upon conditions which the city failed to perform—the contract was never executed. Here the contract is executed fully, and both parties relied on it for four years.

It is the difference between an executed contract and an executory contract, or an agreement to execute upon conditions which the city failed to comply with. In the latter case the court declares (20 vol. supra) that there was no binding contract. In the former—the case at bar—the appellant is asking the rescision of a complete, executed contract.

If A agrees to give B $100 for a horse, if after one month's trial he suits him as a carriage horse, this is an executory contract of sale, dependent for consummation upon the fitness of the horse as a carriage animal, after trial. If upon trial the horse proves unfit, there is no sale. But if A give B his note for $100 for a horse, and B delivers the horse, here the contract is executed, and B cannot rescind it simply on the ground that A fails to pay the $100 note. In the former case the *performance*, and not the promise, is intended to operate as a satisfaction. In the latter case the promise is received as satisfaction.

And this is *this* case and *that* is the Brown case, and *that* is the case of Brown vs. Spofford, 95 U. S., cited in Mr. Randolph's brief, p. 22. See that case, p. 483; see, also, U. S. vs. Clark, Hempstead, 312; Early vs. Rogers, 16 How., 595; 2 Par. Con. (6 ed.) 685; 2 Story, Con. (5 ed.) 537; Chitty, (10 ed.) 693, and so are all the authorities.

Opposing counsel (Brief, p. 18) says: "I do not conceive it "necessary to argue that there was no consideration for the "giving up by J. & M. Loudon of one-half of the debt due "them as they did by accepting the city's bonds, worth only "fifty cents on the dollar, and therefore they were never "bound by the arrangement of September, 1872, and could at "any time have sued to recover the balance due them over and "above the value of the bonds."

If we understand his case, this is precisely what it is necessary for him to argue; when, in consideration of accepting the $45,000 of bonds worth fifty cents on the dollar, which he knew when he accepted them (f. 108), he got the city to assume the payment of $8,179.81 on which it was not bound, and put his debt in a negotiable form and settled amount, which he could have enforced the payment of, and besides had the city to appropriate three-tenths of certain taxes to pay the $64,-631.18 judgments he held against it.

He cites Cumber vs. Wane, 1 Smith's Leading Cases, 439, top p. 595, in support. But applying the discussion there to the facts of this case, it is authority against appellant. We quote from that case, *p. 444. "The general doctrine in Cumber vs. Wane, and the reason of all the exceptions and distinctions which have been engrafted on it may, perhaps, be summed up as follows, viz: That a creditor cannot bind himself by a simple agreement to accept a smaller sum in lieu of an *ascertained* debt of a larger amount, such an agreement being *nudum pactum*. But if there be any benefit, *or even legal possibility of benefit*, to the creditor thrown in, that additional weight will turn the scale, and render the consideration sufficient to support the agreement. Citing Steinman vs. Magnus, 2 Camp. 124; 1 East. 390, Bradley vs. Gregory, 2 Camp. 383; Wood vs. Roberts, 2 Stark 417; Boothly vs. Snowden, 3 Camp. 275; Sebree vs. Tipp, 15 M. & W. 23.

So an unliquidated or uncertain and *disputed* demand overdue may be discharged by the payment of any agreed sum (Smith's Leading Cases, *444); * * or by a *negotiable instrument* binding the debtor, or a third person, to pay a smaller sum.

All of these elements support the settlement of September, 1872.

See, also, Code of Tennessee, § 3789: "All receipts, releases "and discharges in writing, whether of a debt of record or a "contract under seal, or otherwise, shall have effect according "to the intention of the parties thereto."

§ 3790. "All settlements in writing, made in good faith, for

"the composition of debts, shall be taken as evidence, and held "to operate according to the intention of the parties, although "no release under seal is given, and no new consideration is "given."

But Mr. Randolph says (brief, p. 19) the city did not pay the three-tenths, and therefore his client is not bound to accept the $45,000 in bonds, and can now recover the debt as it existed in September, 1872, less the market value of the bonds.

We think we have already shown the fallacy of this, and will add: "An accord with mutual promises to perform is good, though the thing be not performed at the time of action, for the party has a remedy *to compel performance.* The rational distinction seems to be, that if the *promise* be received in satisfaction, it is a good satisfaction; but if the *performance,* not the *promise,* is intended to operate in satisfaction, there shall be no satisfaction without performance.

See 1 Smith's Leading Cases, *444, top page 601, citing Reeves vs. Hearne, 1 M. & W. 326; Buttiguy vs. Booker, 9 C. B. 689; Evans vs. Powis, 1 Exch. 601.

This disposes of Loudon's appeal; for though there is a great deal more of Mr. Randolph's brief, we submit that this is all there is *in* it.

The decree refusing him relief is correct, and should be affirmed.

But we insist that the decree of the court below, ordering the city to set apart and pay over to Loudon three-tenths of all taxes collected for general purposes, for 1872, 1873, 1874, 1875, 1876, 1877, 1878, and succeeding years until Loudon's $11,157.87 judgment was fully paid, was erroneous and should be reversed.

It may be said that our appeal from this decree being dismissed, we cannot be heard on this part of the case now.

But we submit we can be heard on London's appeal, because he appealed from "the decree herein rendered denying the relief prayed in the bill." This brought the case here, and the appeal of the city was unnecessary.

But whether unnecessary or not, and though it has been dismissed, still we are entitled to be heard upon the whole case.

Where a part of a decree is appealed from, this opens the whole case to respondent.

Cooper's Dan. Ch. Pr. *1489, 1490, and cases cited in notes; 1 Pere Williams, 300; Carnes vs. Polk, 5 Heisk., (Tenn.) 244. 1 Beasley (N. J.) 318. 3 Johns Ch 5-87.

And the court will hear the whole case as if both appeals were perfected; and on the same record*.

Indeed, Mr. Randolph (brief, p. 22) characterizes this part of the decree as "little less than a mockery," and it is fair to suppose that he will not seriously resist its reversal.

But the decree is clearly erroneous. It is outside of the relief asked, and not in aid of the relief asked, and is wholly inconsistent with the relief asked.

"It is to be observed," says Daniel, (Cooper's Daniel, Ch. P, *382,) "that in order to entitle a plaintiff to a decree under the general prayer, different from that specifically prayed, the allegations relied on must not only be such as to afford a ground for the relief sought, but they must have been *introduced into the bill for the purpose of showing a claim to relief*, and not for the mere purpose of corroborating the plaintiff's right to the specific relief prayed; otherwise, the court would take the defendant by surprise, which is contrary to its principles. Therefore, where a vendor filed a bill for a specific performance, but, owing to his not being able to make out a title to some part of the property, was unable to obtain a decree for the purpose, it was held that he could not, under the prayer for general relief, obtain an inquiry into the management of the property during the time it was in the vendee's possession, although the bill did contain charges of mismanagement, which, however, had been introduced, not *with the view to obtain* compensation, but to establish the fact of acceptance of the title by the defendant.

*U. S. Revised Statutes, (second edition,) 189, Section 1013: "Where appeal is duly taken by both parties from the judgment or decree of a Circuit or District Court to the Supreme Court, a transcript of the record filed in the Supreme Court by either appellant may be used on both appeals, and both shall be heard thereon in the same manner as if records had been filed by the appellant in both cases."

Stevens vs. Guppy, 3 Russ., 171, 185; Ferraby vs. Hobson, 2 Phil., 255–7; Chapman vs. Chapman, 13 Beav. 508; 15 Jur. 265;) Smith vs. Smith, 1 Ird. Eq., 83.

In Stevens vs. Guppy, which was a bill filed by the vendor of a share of a partnership business against the purchaser who had taken possession—charging that he had grossly *mismanaged the property and destroyed* its value, and praying that he might be declared to have accepted the title, and might be decreed to perform the contract specifically, with a prayer for general relief—Lord Lindhurst said: "It is then said, that though he "cannot have the contract performed, he is entitled, *upon the* "*frame of this record*, and *under the prayer for general relief*, "to a remedy of a different kind, namely, to have an inquiry "concerning the management of the partnership by Guppy, "and to have compensation for the injury he (Stevens) has sus- "tained. It is true that the bill does contain charges of mis- "management of the property by Guppy; but with what view "and for what object are those charges introduced? We have "only to look at the record to see that they are introduced, "not with a view to demand compensation for any loss alleged "to have been sustained, but in order to establish the fact of "acceptance of the title by the defendant, and of waiver of all "objections to it, *and thereby to make out the plaintiff's right to* "*specific performance.*

"Under such circumstances, it would be unjust to allow the "plaintiff to abandon the case made by his bill, and to move, "at the hearing, for a new remedy upon a record framed with "*an aspect altogether different.*

"My opinion, therefore, is that, as the case is shaped before "me, the plaintiff is not entitled, under the general words of "the prayer, to a particular relief with respect to the loss "arising from the management of the property.

"Besides, there were other persons interested in the partner- "ship when the alleged mismanagement took place. How, "under the decree between Stevens and Guppy alone, could "all the liabilities be arranged which may be involved in "giving Stevens the compensation he asks."

This case is decisive.

The allegation of appellant's bill as to the three-tenths to be set apart was not inserted for the purpose of alternative or independent relief, nor was any such asked, but only in aid of the relief asked; and the decree of the court was a surprise on the city. Besides, other persons were interested in the one dollar tax, of which the court decreed three-tenths to plaintiff. This was a tax for the general purposes of the city, and with it the fire and police, lights, contractors for city work, &c., were to be paid and furnished.

The charter of Memphis in force at that time provided:

"SECTION 63 *Be it further enacted*, That no such municipality shall assess, levy or collect a greater rate of taxes than one dollar and sixty cents on each one hundred dollars' worth of taxable property in such city for any and all purposes And the assessment of real and personal property of such city, by the State and County Tax Assessor, for State and county purposes, shall be the assessment for city purposes; but the tax may be collected by a city collector; *Provided*, such collector shall not receive, as compensation, exceeding three fourths of one per cent. for his services.

"SEC. 64 *Be it further enacted*, That it shall be the duty of the General Council immediately after the assessment of the property of the city for taxation, to make out what is known in legislative parlance a budget, and apportion the one dollar and sixty cents to defray the various items of expense incident to carrying on the city government; *Provided*, that not more than one dollar, or one per cent., shall be appropriated to defraying general expenses, police and fire departments, officers' salaries, water and lights, improving or repairing streets, etc., and not more than sixty cents shall be appropriated to special purposes; of this amount, twenty cents shall be appropriated to the payment of interest on the bonded debt; twenty-five cents shall be appropriated to providing a sinking fund to retire the bonded indebtedness; ten cents shall be appropriated to the maintenance of the city schools, and five cents shall be appropriated to the payment of judgments.

"SEC. 65. *Be it further enacted*, That the General Council shall not engage or contract for any item of expense, without first appropriating a sufficient amount of one dollar, or one per cent., of general tax of the current year, to pay such engagements or contracts, upon the basis that the whole tax will be collected; otherwise the individual members of the General Council, or those favoring or voting for, shall be held individually liable; and when the money for a particular purpose shall have been collected and paid into the treasury, and the Treasurer shall have paid it out for any purpose other than that for which it was collected, then the Treasurer and his bondsmen shall be held bound to pay the party or parties entitled to receive the misapplied money."

* * * * * * * *

"SEC. 67. *Be it further enacted*, That all parties contracting with municipal corporations, shall not, by reason of their contracts, acquire any gen-

eral claim against the corporation or city, but shall look solely to the sum set apart specially for the payment of their claims. And contracts made by municipal corporations shall not be valid or binding unless they specify the fund out of which they are to be paid, and then shall only constitute a liability to be enforced out of the special fund for the year in which the contract was made and the tax was levied, or assessed and collected. All persons dealing with municipal corporations shall be put upon inquiry as to their powers; and every act, contract or agreement, *ultra vires*, shall be null and void. (Acts of 1875, p. 136.)

The decree of the court, in disregard of the rights of these parties, appropriated part of what belonged to them (contractors, policemen, firemen, &c.,) to the plaintiff, without an opportunity to them to be heard; and crippled the city administration without an opportunity to it to be heard; for it was not in court to meet that case, and, therefore, was not prepared to meet it.

It was a decree outside of the relief asked—outside of the proof, outside of the prayer of the bill, and wholly inconsistent with the relief asked, and outside of all precedent.—See also, 3 Otto, 282.

For these reasons it was manifestly erroneous, and should be reversed.

We insist, therefore, upon the affirmance of the decree of the court refusing the relief appellant asked, and upon the reversal of the decree giving relief not asked; and that this court will do what the court below should have done—dismiss appellant's bill.

ISHAM G. HARRIS AND C. W. HEISKELL,
Att'ys for Taxing District.